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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

**FRED RICE,**

*Petitioner,*

vs.

**JOHN AURIEMMA, et al.,**

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTIONS PRESENTED

Whether a public official is entitled to qualified immunity for employment decisions that, objectively, did not violate then clearly established affirmative action law, where the official denies that he had any racial motivation—affirmative or negative—in undertaking the challenged actions.

Whether dictum can clearly establish law for qualified immunity purposes.

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OCTOBER TERM, 1990

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*Petitioner,*

vs.

**JOHN AURIEMMA, et al.,**[1]

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Fred Rice, the former Superintendent of the Chicago Police Department, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, sitting *en banc*, entered in the above-entitled proceeding on August 20, 1990.

[1] Initially there were eighteen plaintiffs. The sixteen who remain and are respondents to this petition are: John Auriemma, Daniel Coll, Marshall Consadine, Renaldo Cozzi, Kenneth Curin, Russell Ditusa, Thomas Farogoi, John Hinchy, Kathryn Kajari, George Marcin, Patrick McDonough, John Rafter, Dominic Rizzi, James Stampnick, Thomas Walton and Roger Whalen.

## OPINIONS BELOW

The opinions of the majority and dissent of the panel of the United States Court of Appeals for the Seventh Circuit are reported at 895 F.2d 338 and are reprinted in the separate appendix at pp. A.1-A.28. The *en banc* opinion of the Seventh Circuit, together with three dissenting opinions, are reported at 910 F.2d 1449 and are reprinted in the separate appendix at pp. C.1-C.32.

The minute orders announcing the decisions of the United States District Court for the Northern District of Illinois (Holderman, J.) denying petitioner's motions for summary judgment and for reconsideration are not reported. They are reprinted, together with the relevant portions of transcribed proceedings where the judge announced his decisions and reasoning, in the separate appendix at pp. D.1-D.11 and E.1-E.7.

## JURISDICTION

The respondents brought this suit in the Northern District of Illinois under 42 U.S.C. §§ 1981, 1983 and 1985(3). The district court's jurisdiction was based upon 28 U.S.C. §§ 1331 and 1343.

Petitioner filed a motion for summary judgment, asserting that he was entitled to qualified immunity on all counts of the Second Amended Complaint. On March 6, 1989, the district court entered an order granting petitioner's motion in part and denying it in part. Petitioner

immediately filed a motion to reconsider, which the district court denied on March 7, 1989.

Petitioner took an interlocutory appeal from the denial of qualified immunity pursuant to *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985). The United States Court of Appeals for the Seventh Circuit had jurisdiction of the appeal under 28 U.S.C. § 1291. A panel of the Seventh Circuit heard the case and issued an opinion on February 6, 1990. Respondents sought and were granted a rehearing of the case and the Seventh Circuit, sitting *en banc*, after rehearing issued its opinion and judgment on August 20, 1990. No rehearing of that judgment was sought.

## STATEMENT OF THE CASE

This is a civil rights action brought by sixteen white police supervisors in the Chicago Police Department who claim they were demoted because of their race in violation of the equal protection clause and 42 U.S.C. §§ 1981, 1983 and 1985(3). Four of these officers also claim that petitioner retaliated against them for filing this lawsuit, in violation of the first amendment and 42 U.S.C. § 1983. Petitioner Fred Rice was the Superintendent of the Chicago Police Department and made the personnel decisions about which respondents complain.

Petitioner was appointed Superintendent of the Chicago Police Department in August, 1983. R. Doc. 103 at par. 2. As his predecessors in office had done, shortly after assuming the position of Superintendent, petitioner reorganized the top management ranks of the department. R. Doc. 105, Beazley Affidavit.

As part of his reorganization, Rice demoted twenty-six white officers, including all of the respondents, from the top management ("exempt rank") positions they had held for varying periods of time. R. Doc. 50 at Count III, pars. 23-41, 50-51; R. Doc. 105, Holton Affidavit. The exempt rank officers are the highest level managers of the department, making and executing police policy in the supervision and direction of over 15,000 police employees. R. Doc. 105, Holton Affidavit. No black officers in the exempt ranks were demoted, but one Hispanic officer was, and six positions were eliminated. R. Doc. 105, Beazley Affidavit. At the same time, Rice announced twenty-one promotions of new officers into the exempt ranks. Of those, nine were white, nine were black and three were Hispanic. *Id.* Rice also promoted four black officers who were already in the exempt ranks to higher positions. Prior to the reorganization, the exempt ranks of the Chicago Police Department were 83% white, 13% black, and 4% Hispanic, whereas the total department work force was 69% white, 27% black, and 4% Hispanic. R. Doc. 125. After the reorganization, the exempt ranks were 71% white, 24% black and 4% Hispanic. R. Doc. 105, Beazley Affidavit.

Respondents alleged in their complaint that the demotions of white officers were done pursuant to a plan to "demote white Chicago police officers who held supervisory command positions and to make these positions available to black officers." R. Doc. 50 at Count III, par. 57. Some of the respondents further claimed that because of "the filing of the original complaint in this action, plaintiffs have been subjected to a pattern of harassment and retaliatory treatment by defendant[ ] Rice." R. Doc. 50 at Count V, pars. 65 and 73. Petitioner denied that he made his personnel decisions based on race. R. Doc. 122 at p. 12.

After extensive discovery, petitioner and other defendants moved for summary judgment, claiming that respondents had failed to raise a material issue of fact about whether Rice was racially motivated in his decisions. R. Doc. 57. In opposing the motion for summary judgment, respondents relied upon four factual assertions: (1) that Rice referred to the racial composition of the exempt ranks and that of the total police department in a meeting with Michael Holewinski, Mayor Washington's liaison to the police department, in December 1983, R. Doc. 73 at par. 66, incorporated by reference in R. Doc. 122 at n.1; (2) that in determining his December 1983 personnel changes, Rice utilized a chart which contains a notation referring to the race of the officers, R. Doc. 73 at par. 65; (3) that during respondent McDonough's demotion interview, Rice told him that he had done a good job, "but it's the numbers game," *id.* at par. 89; and (4) that in November, 1983, Ed Bishop, who was shortly thereafter promoted to be Rice's executive assistant, told one of the officers being demoted that Rice had already "talked with" City Hall, and that it was Bishop's position that Rice could do what he wanted to remove whites and replace them with blacks because of past discrimination in the police department, R. Doc. 69, p. 37. The district court denied defendants' motion. R. Docs. 79, 80.

Subsequently, petitioner moved again for summary judgment, this time on the basis of qualified immunity. That motion was also denied in relevant part, see separate Appendix at D.1. Petitioner's motion for reconsideration was also denied, see separate Appendix at E.1. In an opinion issued on February 6, 1990, a majority of a panel of the Seventh Circuit reversed, holding that petitioner was entitled to qualified immunity on the race claims since his conduct could reasonably be justified under then-existing

affirmative action law, and to judgment on the retaliation claims, since respondents were "solely interested in advancing their own private employment interests," not in raising "an issue of public concern," and thus had failed to state a constitutional claim. App. at A.19, A.20.

The court granted respondents' request for rehearing and reheard the case *en banc* on May 30, 1990. The full court issued its judgment and opinion in favor of respondents on all issues relevant to this petition on August 20, 1990. The majority held that petitioner was not entitled to qualified immunity on either the race or retaliation claims. On the race claim, the majority reasoned that since Rice had denied utilizing any affirmative action rationale when he demoted respondents, he was not entitled to qualified immunity based on the unsettled state of affirmative action law at the time. See App., C.8-C.15. On the retaliation claim, the majority affirmed the district court in its holding that when the Seventh Circuit in an earlier case held that the filing of a lawsuit that did not implicate matters of public concern was unprotected by the first amendment, it "clearly established" the obverse: that the filing of suits that do raise matters of public concern is protected. Because, in the majority's view, this action did raise issues of public concern, the majority denied petitioner qualified immunity. See App. C.18-C.21. Four judges dissented in three separate opinions. See App. C.22-C.32.

## REASONS FOR GRANTING THE WRIT

### I.

### THE SEVENTH CIRCUIT'S FAILURE TO GRANT PETITIONER QUALIFIED IMMUNITY MAKES THAT DEFENSE LARGELY UNAVAILABLE TO PUBLIC OFFICIALS ACCUSED OF CONSTITUTIONAL VIOLATIONS WHERE INTENT IS AN ELEMENT OF THE OFFENSE, EVEN WHERE THE OFFICIAL'S CONDUCT IS, AS HERE, OBJECTIVELY REASONABLE UNDER EXISTING LAW.

#### 1. The Issue Presented By This Case Is Unresolved And Arises Frequently In The Federal Courts.

This case presents an important issue of federal law which arises frequently in civil rights litigation: whether a public official is entitled to qualified immunity at or before the summary judgment phase of litigation, where intent is an element of the asserted constitutional offense. When this Court adopted an objective test for qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), it intended to "purge[ ] qualified immunity doctrine of its subjective components." *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985). This Court "rejected the inquiry into state of mind in favor of a wholly objective standard." *Davis v. Scherer*, 468 U.S. 183, 191 (1984).

The question posed by this case is one that virtually every court of appeals has had to grapple with since *Harlow*: whether, as Justice Scalia wrote in *Halperin v. Kissinger*, 807 F.2d 180, 185 (D.C. Cir. 1986), "the expansive language of *Harlow*, *Forsyth*, and *Davis* is to be taken seriously." That question, unanswered in 1986, remains unanswered today. In this case, the *en banc* court stated, "we note that the Supreme Court has not yet fully

explored a court's inquiry in applying an objective analysis to a claim that depends on the official's state of mind," (citations omitted). App. at C.6. *See also Siegert v. Gilley*, 895 F.2d 797, 801 (D.C. Cir. 1990) ("it is by no means clear that the Supreme Court intended this expansive language to preclude *any* inquiry into subjective motivation"); *Poe v. Haydon*, 853 F.2d 418, 431 (6th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989) ("this area of the law is murky"); *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 648 (10th Cir. 1988) ("The Supreme Court has yet to state how the *Harlow* standard should be applied when the governmental actor's intent is the critical element of the plaintiff's underlying substantive claim," citing *Gutierrez v. Mun. Court*, 838 F.2d 1031, 1050 n. 25 (9th Cir. 1988), *vacated and remanded*, 109 S. Ct. 1736 (1989)); *Martin v. D.C. Metropolitan Police Dept.*, 812 F.2d 1425, 1439 (D.C. Cir.), *vacated in part*, 817 F.2d 144, *reinstated*, 824 F.2d 1240 (1987) (Starr, J., concurring in part and dissenting in part) ("vexing and sensitive questions" are posed by application of *Harlow*'s objective test to claims "premised on a government official's motive or purpose").

The Seventh Circuit has developed a two pronged analysis to satisfy what it views as the twin inquiries mandated by *Harlow*: "(1) Does the alleged conduct set out a constitutional violation? and (2) Were the constitutional standards clearly established at the time in question? . . . Intent is relevant to (1) but not to (2)." App. at C.6, quoting *Wade v. Hegner*, 804 F.2d 67, 70 (7th Cir. 1986). Other courts have refused to eliminate intent from any part of the analysis. *See, e.g., Feliciano-Angulo v. Rivera-Cruz*, 858 F.2d 40, 45 (1st Cir. 1988) ("We thus conclude that *Harlow* will not bar inquiry into a defendant's state of mind when the applicable law makes the defendant's state of mind (as distinct from defendant's *knowledge* of the law) an essential element of plaintiff's constitutional claim");

*Martin*, 812 F.2d at 1433 (when the defendant's intent, unrelated to knowledge of the law, is an essential element of plaintiff's claim, "plaintiff must be afforded an opportunity to overcome an asserted immunity with an offer of proof of the defendant's alleged unconstitutional purpose").

A number of circuits have tried to strike a balance between the "early termination of insubstantial claims"—the announced, but still unrealized aim of *Harlow* (*see Halperin v. Kissinger*, 807 F.2d 180, 186 (D.C. Cir. 1986)—and affording plaintiff some opportunity to prove allegations of unconstitutional motive, *see Siegert v. Gilley*, 895 F.2d 797 (D.C. Cir. 1990). For example, the District of Columbia Circuit has developed a heightened pleading standard whereby a plaintiff is required to provide factually specific allegations to support claims of unconstitutional motive. Further, once a defendant makes a showing of the objective legal reasonableness of his conduct, the plaintiff must offer "some direct evidence that the officials' actions were improperly motivated" to avoid pretrial dismissal. *Siegert v. Gilley*, 895 F.2d at 805 (Wald, J. dissenting) (summarizing law). The Tenth Circuit has adopted a similar rule to guide disposition of summary judgment motions in such cases:

> Where the defendant's subjective intent is an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to specific evidence that the official's actions were improperly motivated.

*Pueblo*, 847 F.2d at 649. By contrast, the Ninth Circuit has flatly held that qualified immunity is not available as a defense in cases involving intentional discrimination. *See Gutierrez*, 838 F.2d at 1051.

Because the courts of appeals have so frequently and with such mixed results sought to solve this difficult problem of how to apply *Harlow* in cases alleging intentional conduct, this Court should grant review.

**2. The Seventh Circuit's Refusal To Grant Qualified Immunity Here Contrasts With Four Decisions In Other Circuits Where Immunity Was Granted Even Though The Plaintiff Claimed That Objectively Reasonable Conduct Was Unlawful Due To The Defendant's Motivation.**

In the current case, the issue of qualified immunity arose after extensive discovery. Petitioner initially sought summary judgment on the grounds that the respondents had not produced sufficient evidence to raise a genuine issue of fact concerning an illegal motive for petitioner's reorganization of the police department. When that motion was denied, petitioner then argued that the evidence showed his conduct was objectively reasonable. If there was any racial motivation, which petitioner denied, each of the four elements of respondents' own proof pointed to a permissible effort under then existing law to correct a statistical underrepresentation of minorities, specifically blacks, in the exempt ranks of the Chicago Police Department: (1) the evidence that petitioner was playing a "numbers game", as one respondent claims petitioner told him, R. Doc. 73 at par. 65, and (2) that he believed racially conscious reassignments were permissible because of past discrimination in the police department, as his new Executive Assistant allegedly asserted, R. Doc. 69, p. 37, show only a desire to correct a racial imbalance created by past discrimination. (3) The fact that on the day petitioner announced the reorganization he held a chart that indicated the race of one of the newly promoted officers, may tend to prove race consciousness, but objectively, it neither proves nor disproves a then permissible "affir-

mative action" state of mind as opposed to an invidiously discriminatory state of mind. Finally, (4) the allegation that petitioner met with an aide to the Mayor prior to the reorganization and discussed the racial makeup of the exempt ranks as compared with the police department as a whole is evidence of an affirmative action intent, rather than an invidious intent.[2]

It is evident from the respondents' pleadings below that their own theory of their case was that petitioner had engaged in illegal affirmative action. The respondents' own evidence, assumed to be true since they are the parties opposing summary judgment, thus demonstrates petitioner's entitlement to qualified immunity. No member of the *en banc* court disagreed with the dissent's conclusion that a public official could reasonably have believed in 1983, based upon the Seventh Circuit's decision in *Lehman v. Yellow Freight System, Inc.*, 651 F.2d 520 (7th Cir. 1981), that a limited, one-time reorganization of a segment of the workforce to correct a racial imbalance was lawful. App. at C.13. In refusing to look at the objective reasonableness of the petitioner's conduct, the majority of the *en banc* court abandoned this Court's teaching in *Harlow*.

In three different contexts, other circuit courts of appeals have accorded public officials qualified immunity in cases where, like here, the conduct challenged was objec-

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[2] The majority's comment, App. at C.14, n.3, that petitioner did not "have, use or want" figures on the disparity in the exempt ranks, ignores the reliance respondents placed on petitioner's knowledge and use of those statistics to defeat petitioner's motion for summary judgment. See Plaintiffs' Response to Motion for Summary Judgment, R. Doc. 73, at 19.

tively reasonable, but could have been adjudged unconstitutional if the plaintiff was able to prove that it had been undertaken for an improper purpose. In *Lewis v. City of Ft. Collins*, 903 F.2d 752 (10th Cir. 1990), the plaintiff, a Hispanic woman over forty years old, had claimed that her position was eliminated, not for valid business reasons, but because the defendant managers of the City of Ft. Collins wanted to replace older, more senior employees with younger white male employees. *Id.* at 753-54. The defendants responded with evidence designed to show that the reorganization was objectively reasonable for sound business purposes. Because the defendants made a prima facie showing of the objective reasonableness of their conduct, and the plaintiff's evidence was only the circumstantial fact that many of the available higher level positions were eventually filled by white males, the court refused to allow a jury to decide whether the conduct was, in fact, illegally motivated. *Id.* at 759. The court also refused to permit the plaintiff to engage in additional discovery to try to unearth more evidence of animus, emphasizing the importance of terminating insubstantial lawsuits as swiftly as possible. *Id.* at 755; 759.

In two cases complaining about illegally motivated conduct undertaken incident to lawful arrests, the First and Eighth Circuits refused to permit inquiry into the true motivation of the public officials. In *Floyd v. Farrell*, 765 F.2d 1 (1st Cir. 1985), a convicted felon out on parole was arrested for driving a stolen car. A warrant had been issued for the arrest of his father for theft of the car, and the plaintiff alleged that he was arrested and then charged with the felony of receipt of stolen property and held on a high bail, in order to induce his father to turn himself in to the police. Certainly, making someone into a hostage by charging him with a felony, rather than a

misdemeanor, for the sole purpose of inducing another to come forward, offends the Constitution. Yet the court, citing *Harlow*, made an "objective analysis of the reasonableness of conduct in light of the facts actually known to the officer." The court went on to state, "Nor are actual motives for conduct to be considered in evaluating a qualified immunity defense. It was to prevent such inquiries that the Supreme Court eliminated from the test for qualified immunity consideration of 'permissible intentions.' " 765 F.2d at 6, citing *Harlow*, 457 U.S. at 815-19.

Similarly, in *Russell v. Hardin*, 879 F.2d 417 (8th Cir. 1989), the plaintiff had alleged that officers had a dual motive when they searched his premises and seized some silver: plaintiff agreed that the officers had a lawful reason to search for a fugitive, but asserted that at least one of them had an improper motive of illegally seizing the silver for the Internal Revenue Service, which he knew to be interested in the plaintiff but which he also knew had not yet requested any search of the premises for assets. *Id.* at 418. Because the search was objectively reasonable, the court granted the defendants qualified immunity, refusing to look beyond the objective reasonableness at any other asserted motivation. *Id.* at 421.

Finally, in *Halperin v. Kissinger*, 807 F.2d 180, the court granted qualified immunity to defendants for their unauthorized wiretap of the plaintiff because their conduct, viewed objectively, was reasonable if undertaken for national security reasons. The plaintiff was not allowed to examine the defendants' real motivation, to attempt to prove they were motivated by something other than concern for the national security. *Id.* at 188. In deciding to foreclose an inquiry into real motivation that might disclose a constitutional violation, the court satisfied the plain wording of *Harlow*, *Forsyth* and *Davis*, at the same

time following the well beaten path establishing a "special rule for national security matters". *Id.* at 187.

Whatever the factual differences between the present case and these four cases, the principle of qualified immunity recognized in *Harlow* should control: a court should terminate litigation once a showing of objective reasonableness has been made, even when a plaintiff seeks to continue to try to prove an illegal motive that would transform otherwise lawful conduct into a constitutional violation.

Granting petitioner qualified immunity on an objective basis in this case will not deprive many aggrieved plaintiffs of the means to redress constitutional deprivations. In those situations where the defendant's conduct can be shown to be objectively reasonable in light of existing law, qualified immunity should protect a public official from the burden of litigating over his subjective intent. In the area of deliberately discriminatory actions motivated by racial animus, an employee often claims that an act lawful on its face was undertaken for a hidden discriminatory purpose, in violation of existing law. Employment decisions giving rise to allegations of racial discrimination should not receive a wholesale exemption from the doctrine of qualified immunity. That is particularly true of decisions, like the one challenged here, that were undertaken during the years that affirmative action law has been in almost constant flux, and hence are readily viewed as reasonable under existing law. It is precisely to shield public officials from liability for public actions they have taken when the law was unsettled that qualified immunity was developed.

Because this case presents this Court with an opportunity to settle a recurring issue of great difficulty and

importance to public officials, and, in so doing, give guidance to the circuits that are struggling to apply *Harlow* in the many areas of civil rights law where intent is an element of the offense,[3] this petition should be granted.

## II.

## THE SEVENTH CIRCUIT'S RELIANCE UPON DICTUM AS HAVING CLEARLY ESTABLISHED LAW IS INCONSISTENT WITH THE RULE THAT PUBLIC OFFICIALS SHOULD NOT BE LIABLE FOR DAMAGES UNTIL THE LEGAL CONTOURS OF THE RIGHT ASSERTEDLY VIOLATED ARE SUFFICIENTLY CLEAR THAT A REASONABLE OFFICIAL WOULD UNDERSTAND HE IS VIOLATING THAT RIGHT.

A majority of the Seventh Circuit, sitting *en banc*, denied petitioner qualified immunity from respondents' claim

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[3] A forbidden intent frequently transforms otherwise lawful conduct into a constitutional violation in a number of different situations, *see, e.g., City of Canton v. Harris*, 109 S. Ct. 1197, 1204 (1989) (a municipality is liable under § 1983 for failure to train police officers only if "failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact"); *Arizona v. Youngblood*, 488 U.S. 51 (1988) (Failure to preserve exculpatory evidence in a criminal prosecution is unconstitutional only if done in bad faith); *Daniels v. Williams*, 474 U.S. 327, 348 (1986) ("The Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss or injury to life, liberty, or property"); *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977) (otherwise constitutional firing of employee becomes unconstitutional if motivated by employee's exercise of First Amendment rights); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause"); *Estelle v. Gamble*, 429 U.S. 97, 104-06 (1976) (failure to provide medical care for prisoners is a constitutional violation only if it amounts to deliberate indifference to the prisoner's serious medical needs); *Griffin v. Breckenridge*, 403 U.S. 88 (1971) (private conspiracies are actionable under § 1985(3) only if motivated by invidiously discriminatory class-based animus).

that he had retaliated against them for having filed this lawsuit, in violation of a right to be free from such retaliation, which respondents claim is found in the first amendment. In so doing, the majority concluded that petitioner had violated respondent' clearly established first amendment rights. The majority affirmed the reasoning of the district court that a 1984 decision, *Altman v. Hurst*, 734 F.2d 1240 (7th Cir.), *cert. denied*, 469 U.S. 982 (1984), had clearly established in the Seventh Circuit "that a lawsuit raising a matter of public concern was speech protected by the First Amendment, and that retaliation for that conduct would violate First Amendment constitutional rights." App. at D.10. This reasoning seriously undermines the protections found in the law of qualified immunity.

*Altman* drew on this Court's decision in *Connick v. Myers*, 461 U.S. 138 (1983), which announced a balancing test to judge when an employee's free speech was entitled to protection notwithstanding its actual or potential disruption to the workplace. Where the employee's activity was in furtherance of an issue of "public concern," the balance would tip toward the employee. In *Connick* the employee's activity was circulating a petition, not filing a lawsuit, as here. *Altman* was the first opportunity the Seventh Circuit had, after *Connick*, to consider the first amendment dimensions of a lawsuit brought by a disgruntled employee. In *Altman*, the court did not *hold* that a lawsuit raising a matter of public concern was speech protected by the first amendment. Rather, the court there held that the particular lawsuit it was reviewing did not involve a matter of public concern, but was a private personnel matter, and so was not protected. 734 F.2d at 1244. The *Altman* court's statement that the "plaintiff cannot be disciplined consistently with the due process clause in retaliation for the exercise of his first amendment rights,"

*id.* at 1243, was classic "dictum," in that it went beyond the facts of the case before the court. Such judicial remarks, as Chief Justice Marshall said, "may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision." *Cohens v. Virginia*, 6 Wheat. 264, 399 (1821). *Accord Wright v. United States*, 302 U.S. 583, 594 (1938). Because dictum is not "law," and does not control future cases, *a fortiorari* it is not "clearly established" law that puts a public official on notice that his conduct may be unconstitutional.

The district court understood that *Altman* was not precedent for the proposition that the filing of a lawsuit to vindicate private employment grievances was protected by the first amendment:

> I could not find a case clearly articulating that the filing of a lawsuit was an action protected by the First Amendment and, in fact, I think the case law is that the mere filing of an action is not protected by the First Amendment. You must look to the subject matter of the lawsuit in determining whether it's a matter of public concern or a matter of private concern.
>
> Of course, the Altman case, the decision in the Seventh Circuit, was that in that case, which was filed by a police officer, and the allegation was retaliation for encouraging the filing of a lawsuit, that the matter was of private concern, and so, consequently, did not allow for First Amendment constitutional protection.

App. at D.9-D.10.

*Altman* simply did not and could not settle the question for the Seventh Circuit of what lawsuits are protected by the first amendment. The Seventh Circuit's discussion

of the same issue in a subsequent case, *Yatvin v. Madison Metropolitan School Dist.*, 840 F.2d 412 (7th Cir. 1988), demonstrates how unsettled *Altman* left the law. There the court discussed at some length the proposition that not every lawsuit is protected by the first amendment, and cited *Altman* to demonstrate its point. *Id.* at 419. Indeed, in *Yatvin* the court took exception to the apparently "flat rule" stated by the Eighth Circuit that "the 'filing of an EEOC charge and a civil rights lawsuit are activities protected by the first amendment.' " *Id.*, quoting *Greenwood v. Ross*, 778 F.2d 448, 457 (8th Cir. 1985). Instead, the court, "reluctant to federalize the law of retaliatory dismissal," *id.* at 420, suggested that the first amendment status of a lawsuit can only be determined on a case by case basis: "the First Amendment status of a lawsuit depends on the particulars of the suit rather than on the bare assertion that every lawsuit (or even just every discrimination suit) is a form of speech or petition encompassed by the amendment." *Id.*

Far from being readily apparent that the petitioner's alleged conduct violated respondents' constitutional rights, the particular contours of this case were so unclear that the panel first reviewing the case declared the respondents had not even stated a constitutional claim. It was only after the full court reheard the case *en banc* that seven judges concluded the first amendment was implicated; four judges still believed it was not. App. at C.30-C.32. Where reasonable public officials can disagree about the lawfulness of an action, immunity should be granted. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986). *See also Butler v. McKellar*, 110 S. Ct. 1212, 1217 (1990) (the fact that circuit judges take differing positions is "evidence" that a given outcome is "susceptible to debate among reasonable minds").

The Seventh Circuit's use of dictum to "clearly establish" law is not only in error, but gravely endangers the principle enunciated in *Anderson v. Creighton*, 483 U.S. 635 (1987), that:

> the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . in the light of preexisting law the unlawfulness must be apparent.

*Id.* at 639. Here, the *Altman* court had decided nothing more than that the filing of a lawsuit that did not raise matters of public concern was unprotected; there could be no guarantee that the court would find there to be protection when different facts presented themselves. If public officials are left to speculate about the implications of prior decisions if extended to fact patterns not before the court, then the protections offered by the doctrine of qualified immunity are largely eviscerated. Indeed, that is why this Court, in *Anderson*, insisted that a right must be defined with sufficient specificity to clearly apply to the concrete facts before the court before it can be said to be "clearly established." *See* 483 U.S. at 639. *Altman* did not present the facts of this case, and in fact the *Altman* court acknowledged that this court had not yet decided whether the filing of a lawsuit has first amendment protection. That issue remains unsettled today.

Surely the law in this area is not "clearly established." To require public officials to follow each dictum, logical implication or negative pregnant contained in the decisions of not only this court but each circuit is to confine qualified immunity to a far greater extent than *Anderson* permits. For this reason, other circuit courts of appeals have stated that dictum cannot clearly establish the law for

qualified immunity purposes. *See e.g., Donta v. Hooper*, 774 F.2d 721 (6th Cir. 1985); *Zweibon v. Mitchell*, 720 F.2d 162, 172 (D.C. Cir. 1983), *cert. denied*, 469 U.S. 880 (1984) ("clearly establish" does not equate with "clearly foreshadowed"). Here the Seventh Circuit departed from the well-reasoned law in those circuits.

This court should grant review of this case in order to clarify that dictum cannot clearly establish constitutional law; where the law is unsettled and reasonable jurists disagree on the application of dictum to a given set of facts, the public official is entitled to qualified immunity.

## CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari to the Seventh Circuit to review this case.

Respectfully submitted,

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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

**FRED RICE,**

*Petitioner,*

vs.

**JOHN AURIEMMA, et al.,**

*Respondents.*

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

# APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 89-1479

JOHN AURIEMMA, DANIEL COLL,
MARSHALL CONSADINE, RENALDO COZZI,
KENNETH CURIN, RUSSELL DITUSA,
THOMAS FARAGOI, LAWRENCE FORBERG,
JOHN HINCHY, KATHRYN KAJARI,
GEORGE MARCIN, PATRICK MCDONOUGH,
WALTER MURPHY, JOHN RAFTER,
DOMINIC RIZZI, JAMES STAMPNICK,
THOMAS WALTON and ROGER WHALEN,

*Plaintiffs-Appellees,*

*v.*

FRED RICE,

*Defendant-Appellant,*

and

CITY OF CHICAGO,

*Defendant.*

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 1224—**James F. Holderman**, *Judge.*

ARGUED SEPTEMBER 11, 1989—DECIDED FEBRUARY 6, 1990

Before BAUER, *Chief Judge*, WOOD and FLAUM, *Circuit Judges*.

FLAUM, *Circuit Judge*. This case was brought by eighteen white police officers of the Chicago Police Department who claim they were demoted based on race in violation of the equal protection clause of the fourteenth amendment, and 42 U.S.C. §§ 1981, 1983, and 1985(3), by defendant Fred Rice, former Superintendent of the Chicago Police Department. Rice filed a motion for summary judgment based on qualified immunity which was granted with regard to plaintiffs' claims alleging political discrimination and retaliation (for actions taken before June 11, 1984). However, Rice's motion was denied by the district court with regard to the plaintiffs' counts alleging race discrimination, conspiracy to violate civil rights, and retaliation in violation of the first amendment (for actions taken after June 11, 1984). For the reasons set out below, we reverse the district court's partial denial of summary judgment and enter summary judgment based on qualified immunity for the counts of race discrimination and conspiracy to violate plaintiffs' civil rights. We also dismiss plaintiffs' claim of retaliation in violation of their first amendment rights for failure to state a claim.

## I.

Fred Rice was appointed Superintendent of the Chicago Police Department by the late Mayor Harold Washington in August 1983. On December 2, 1983, Rice reorganized the top management ("exempt rank") positions of the police department as is customarily done by incoming superintendents.[1] As part of the reorganization, Rice reassigned or demoted twenty-five white officers from the exempt ranks, demoted no black officers and promoted thirteen black officers to the exempt ranks.

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[1] The exempt rank officers are the highest level managers of the Chicago police department. They create and execute police policy in the supervision and direction of over 15,000 police employees.

Plaintiffs filed a five-count complaint in the District Court for the Northern District of Illinois. In Count I, the plaintiffs alleged the demotions violated their rights to due process of law as guaranteed by the fourteenth amendment. Plaintiffs subsequently dismissed this claim voluntarily. Count II of the Second Amended Complaint alleged that the plaintiffs were demoted for "political reasons." The district court granted summary judgment on this claim finding that Rice was entitled to qualified immunity because "it's not a constitutional violation to make employment decisions based upon political affiliations when party affiliation is an appropriate requirement for effective performance of the public office involved." In Count III, plaintiffs claim that race was "a substantial or motivating factor" in Rice's decision to demote them. Plaintiffs contend that the demotions of the white officers and promotions of the black officers were carried out pursuant to a plan adopted by Rice based on the officers' race. Rice denies that he made his personnel decisions based on race claiming instead that all his decisions were made to bring into the exempt ranks people that embraced his philosophy and accepted his management style. The district court denied summary judgment on this count finding that "it was clearly established that a public official could not use race for making employment determinations in the positions that then Superintendent Rice made, and so, . . . qualified immunity at this stage will be denied." In Count IV, plaintiffs allege that Rice engaged in a conspiracy to violate their civil rights in violation of 42 U.S.C. § 1985(3). The district court denied Rice qualified immunity on this count holding that "the law was clear in 1983 that all racial discrimination . . . was clearly covered by Section 1985(3) . . . ." The plaintiffs' final claim, asserted in Count V, concerns the "harass[ment] and retaliat[ion] against police officers who have filed federal lawsuits against" Rice in violation of 42 U.S.C. § 1983. On this count, the district judge granted summary judgment on the basis of qualified immunity for Rice's acts up to and including June 11, 1984, when this Court

denied rehearing *en banc* in *Altman v. Hurst*, 734 F.2d 1240 (7th Cir. 1984), *cert. denied*, 469 U.S. 982 (1984). Accordingly, Rice's motion for qualified immunity on Count V was denied for all actions after June 11, 1984, "when it was clearly established [by *Altman*] that retaliation for the filing of a civil lawsuit dealing with a matter of public concern was conduct protected by the First Amendment to the Constitution." Rice appeals the denial of qualified immunity on plaintiffs' counts of race discrimination, conspiracy to violate civil rights, and retaliation (for activities after June 11, 1984) in violation of the first amendment.

II.

The sole issue on appeal is whether Rice is entitled to summary judgment based on qualified immunity. Summary judgment is the proper stage at which to resolve a qualified immunity issue because it best protects "government officials from the costs of trial and burdens of discovery, whenever possible." *Rakovich v. Wade*, 850 F.2d 1189, 1205 (7th Cir. 1988) (*en banc*); *see also Harlow v. Fitzgerald*, 457 U.S. 800 (1982). "Under the doctrine of qualified immunity, public officials performing discretionary functions are protected against suits for damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known." *Doe v. Bobbit*, 881 F.2d 510 (7th Cir. 1989) (citing *Harlow*, 457 U.S. at 818). Thus, "[t]he general rule of qualified immunity is intended to provide government officials with the ability to 'reasonably anticipate when their conduct may give rise to liability for damages.' " *Anderson v. Creighton*, 483 U.S. 635 (1987) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1983)). Correspondingly, the inherent intent of qualified immunity is to protect government officials from nonmeritorious lawsuits.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court enunciated the modern standard to be applied in qualified immunity cases. The Court held that the official's entitlement to qualified immunity "focuses on the

objective legal reasonableness of an official's acts." *Harlow*, 457 U.S. at 819. "In *Harlow*, the Supreme Court eliminated the subjective good faith element from the qualified immunity analysis and held that 'government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Polenz v. Parrott*, 883 F.2d 551, 554 (7th Cir. 1989) (quoting *Harlow*, 457 U.S. at 818). This Court has also stated in *Rakovich* that "under *Harlow*, an objective immunity analysis at the summary judgment stage prior to discovery does not include an evaluation of intent. This is because evaluating intent would be a factual analysis, whereas the objective inquiry is a legal question." *Rakovich*, 850 F.2d at 1210. Such an interpretation is consistent with *Harlow's* approval of deciding qualified immunity cases at summary judgment because "[a]n objective analysis is less fact bound than a subjective analysis, making summary judgment a practical and effective means of terminating unnecessary litigation." *Id.*, at 1205. "Thus . . . a qualified immunity analysis entails a purely objective inquiry to determine whether at the time of the alleged illegal act, the right asserted by the plaintiff was clearly established in the particular factual context presented." *Polenz*, 883 F.2d at 554 (citing *Cleveland-Purdue v. Brutsche*, 881 F.2d 427 (7th Cir. 1989). It is with such an objective approach in mind that we review this case.

In light of *Harlow*, however, we note that a court's inquiry in applying an objective analysis to a claim that depends on the official's state of mind has not been fully explored by the Supreme Court. *See Benson v. Allphin*, 786 F.2d 268, 276 n.19 (7th Cir. 1986). This case presents such a dilemma, since alleged racial discrimination, violation of civil rights, and retaliation all inherently involve the intent of an official to discriminate. However, this Court has developed an analysis for the proper inquiry to be undertaken. In considering the proper approach in the face of the lack of guidance by the Supreme Court we have warned that:

> [i]t is a mistake to read *Harlow* too broadly. The elimination of intent from the formula does not mean that the *Harlow* Court sought to limit civil rights actions to those where state of mind was *not* a part of the substantive law. . . . *Harlow* merely states that intent must not be *evaluated or weighed* through a factual inquiry, which would reduce the likelihood that qualified immunity could be decided in a motion for summary judgment.

*Rakovich*, 850 F.2d at 1210 (citations omitted). Therefore, despite the apparent paradox, an objective analysis is applicable to situations involving a public official's state of mind. The objective determination in these cases merely requires courts to not consider intent when making the final determination at summary judgment of whether the law is clearly established.

We are further guided in correctly applying the objective standard to this case by the approach taken by this Court in *Wade v. Hegner*, 804 F.2d 67 (7th Cir. 1986). In *Wade*, we held that *Harlow* calls for the district court to conduct a two-part analysis when state of mind is at issue: "(1) Does the alleged conduct set out a constitutional violation? and (2) were the constitutional standards clearly established at the time in question? . . . Intent is relevant to (1) but not to (2)." *Wade*, 804 F.2d at 70. Thus, when intent is crucial to a party's claim, the court's consideration of intent is relevant to the determination of whether a constitutional violation exists, but not in deciding if the constitutional standard was clearly established. In fact, we stated in *Polenz* that

> where a particular state of mind (e.g., intent, discriminatory motive, retaliatory motive) is an element of the alleged constitutional violation, and the qualified immunity issue arises at the summary judgment or directed verdict stage, in order to answer the step one inquiry, the court must determine whether the plaintiff has factually supported the allegations as to the state of mind element. We made clear, however,

> that the defendant's subjective state of mind is not relevant to the determination of question two.

*Polenz*, 883 F.2d at 554 (footnotes omitted). Therefore, this Circuit has addressed and clarified the ambiguities in the qualified immunity analysis, i.e., "[t]he defendant's subjective good or bad faith is not part of the inquiry." *Id.* at 554 n.3. Having thus examined the relevant legal principles, we now consider Rice's claim to qualified immunity under each of the remaining counts.

## III.

We begin by considering Rice's entitlement to qualified immunity under the plaintiffs' race discrimination claim. Plaintiffs assert, and the district court seemingly found, that intent is a crucial aspect of the entire qualified immunity inquiry. In this respect, the plaintiffs maintain that since Rice does not raise as his defense that he intended to racially balance the exempt ranks, he is precluded from relying on the state of affirmative action law to determine if a constitutional violation was clearly established. The district court apparently accepted this view of the qualified immunity inquiry since it did not consider the state of affirmative action law in determining that "it was clearly established that a public official could not use race for making employment determinations." Therefore, in reaching this decision, the trial court relied on Rice's subjective intent and declined to give adequate weight to the affirmative action aspect of the claim.

We find that such an approach is incompatible with the Supreme Court's holding in *Harlow*. In essence, *Harlow* determined that a subjective inquiry into an official's intent is incompatible with the underlying purpose of qualified immunity, i.e., the ability of government officials to "anticipate when their conduct may give rise to liability for damages." *Davis*, 468 U.S. at 195. In interpreting *Harlow*, this Court has found that when state of mind is at issue, a limited inquiry into intent is relevant in

considering whether there is a constitutional violation but not to see if the law was clearly established. *Wade*, 804 F.2d at 70. Such a limited analysis of intent is consistent with *Harlow* because it does not defeat the official's ability to monitor his conduct.

We follow the guidance from *Wade* and review this question as we do any summary judgment appeal, i.e., we assume plaintiffs' supported allegations as true. *Rakovich*, 850 F.2d at 1210. Under this standard, we conclude that the district court correctly examined the alleged intent in determining that plaintiffs sufficiently alleged a constitutional violation based on racial animus. We must now turn to the second step of the qualified immunity inquiry and determine whether the alleged constitutional violation was clearly established at the time of the alleged violation.

In considering whether the alleged right is clearly established, we must be careful to properly characterize with particularity the right in question. The Supreme Court in *Anderson v. Creighton*, 483 U.S. 635 (1987), defined the necessary specificity to be considered in determining the constitutional right. It emphasized that the identification of clearly established law is not to be applied in broad terms. *Anderson*, 483 U.S. at 639; *see also Cygnar v. City of Chicago*, 865 F.2d 827 (7th Cir. 1989). The Court determined that allowing plaintiffs to allege violations of broad rights would transform qualified immunity into a rule of pleading. The *Anderson* Court was concerned that by merely pleading a violation of an extremely abstract constitutional right plaintiffs could easily get into court. *Davis*, 468 U.S. at 195. "It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. Only by defining the right in these terms will a court properly address the major concerns of *Harlow*.

Based on the Supreme Court's holding in *Anderson* and our interpretation of *Anderson* in *Polenz*, *Doe*, *Rakovich*, and *Wade*, we reject plaintiffs' characterization of the clearly established right at issue in this case. Plaintiffs assert that the demotion of the white officers and the promotion of the black officers were actions based on race and were violative of the equal protection clause of the Constitution. However, such a description of the clearly established right rises to the level of generalization that the Supreme Court condemned in *Anderson*[2] because the characterization does not provide a sufficient basis for a reasonable official to understand that what he is doing violates that right, a crucial aspect of *Harlow*. Instead, "the test for immunity should be whether the law was clear in relation to the specific facts confronting the public official when he acted." *Rakovich*, 850 F.2d at 1209 (quoting *Colaizzi v. Walker*, 812 F.2d 304, 308 (7th Cir. 1987). Then, once the defendant's actions are defined according to the specific facts of the case, this characterization must be compared to the body of law existing at the time of the alleged violation to determine if the particular actions violated the clearly established law. *Id.* at 1209.

We believe that the correct portrayal of the specific right alleged to have been violated involving race in this case is whether a reasonable superintendent of police could have concluded that he could take race into consideration for a limited reorganization of the exempt ranks of the police department. This description of the clearly established right bears a more accurate "relationship to the 'objective legal

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[2] "[T]he right to due process law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*." *Anderson*, 107 S.Ct. at 3039.

reasonableness' that is the touchstone of *Harlow*." *Anderson*, 483 U.S. at 639. It appropriately eliminates the erroneous application of intent from qualified immunity analysis as required by this Court's decisions in *Polenz*, *Rakovich*, and *Wade*. Therefore, under our characterization of the right we are not precluded from considering the state of affirmative action law merely because Rice lacks the subjective intent to implement an affirmative action plan.[3]

The refusal to consider Rice's lack of intent to racially balance and the corresponding proper consideration of the state of affirmative action law is also consistent with our recent decision in *Cygnar v. City of Chicago*, 865 F.2d 827 (7th Cir. 1989). In *Cygnar*, this Court found that a City of Chicago department head charged with race discrimination for promoting whites and demoting blacks in a one-time reorganization was entitled to qualified immunity based on the state of affirmative action law even though he denied using race as a factor in his decisions. In that decision, we found that the defendants intent was not at issue, but rather the question was whether the law put him on notice that his actions violated clearly established constitutional rights. Only by defining the right at issue in an objective manner, through the elimination of intent, can such notice be achieved. There is no reason we should not adopt an analysis similar to that of our decision in *Cygnar* today.[4]

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[3] Contrary to the dissent's assertion, the majority does not "create what is in effect an affirmative action defense for Rice." Rather, *Harlow* and its interpretations in this Court, discussed more fully in the body of the opinion, mandate that we do not consider a public official's subjective intent. Because such intent is irrelevant, the state of affirmative action law becomes part of our inquiry. Therefore, our affirmative action approach is mandated by accepted principles of law.

[4] The plaintiffs try to distinguish *Cygnar* on the ground that the district court in that case found that the defendant was actually carrying out an affirmative action plan and cryptically testified to

(Footnote continued on following page)

We recognize that there may be an inherent irony to an analysis that considers the state of affirmative action law where the defendant denies he had the intent necessary to initiate an affirmative action plan. However, this is the result we must address under *Harlow* and its interpretations by this Court. As previously stated, *Harlow* requires an objective reasonableness test that does not consider the subjective intent of the defendant. Therefore, whether Rice intended to enact an affirmative action plan is not relevant. Rather, it is the objective reasonableness of Rice's actions in light of clearly established law that must be considered. *See Harlow*, 457 U.S. at 819.

We now turn to the question of whether such a right, in light of affirmative action law, was clearly established as of the time of the alleged violation. We look again to *Cygnar* where this Court reviewed the state of applicable affirmative action law during the same time frame. In that case, we determined that in order for a valid affirmative action plan to be implemented in 1983 there must exist: "(1) some type of statistical disparity between the local labor force and the minority composition of the employer's work force and (2) a time limit on the plan." *Cygnar*, 865 F.2d at 844 (quoting *Lehman v. Yellow Freight System, Inc.*, 651 F.2d 520 (7th Cir. 1981)); *see also Fullilove v. Klutznick*, 448 U.S. 448 (1980). Under this analysis, we believe that a reasonable superintendent of police could have concluded that he could consider race for a limited

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[4] *continued*
that effect, whereas in this case Rice vehemently denies ever considering race. This distinction is not as great as plaintiffs would have this Court believe. In *Cygnar* the defendant denied implementing an affirmative action plan, as does Rice in this case. In any event, any minimal factual distinction is irrelevant under the objective qualified immunity analysis established in *Harlow*. Under this view, Rice's intent is not dispositive of the question of whether the law was clearly established at the time and thus plaintiffs' distinction is meaningless.

reorganization of the exempt ranks as this was not a clearly established constitutional violation at the time the violation is alleged to have occurred.

At the time Rice instituted his transfers, a statistical disparity existed between the exempt ranks and the total police department work force. The exempt ranks of the Chicago Police Department were 83% white, 13% black, and 4% hispanic, whereas the total department work force was 69% white, 27% black, and 4% hispanic. After the reorganization, the exempt ranks were 71% white, 24% black and 4% hispanic.[5] Additionally, the reorganization was a one-time restructuring, thereby satisfying the time limit requirement of *Lehman*. Thus, since Rice's actions meet the *Lehman* requirements that defined affirmative action law in this Court as of 1983, we believe that at that time it was not clearly established that Rice's transfers violated the plaintiffs' constitutional rights. As such, Rice is entitled to qualified immunity on plaintiffs' racial discrimination claim.

## IV.

We turn next to Rice's qualified immunity defense on the plaintiffs' claim of a conspiracy to violate their civil rights under 42 U.S.C. § 1985(3). Rice contends, and we agree, that he is entitled to qualified immunity on this claim as well.

In analyzing this claim, we must apply the same *Harlow* qualified immunity analysis as previously discussed. Accordingly, we accept the allegations of the pleadings as true and turn our attention to whether it was clearly established at the time of the alleged violation that a reasonable superintendent of police could not consider race for

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[5] Although this is not the precise test established in the first prong of *Lehman*, it is a sufficiently similar statistical analysis for a government official to reasonably believe it could be used to foster an affirmative action plan.

a limited reorganization of the exempt ranks of the police department. Such a characterization properly defines the right at issue under the *Harlow* and *Anderson* approaches. We must next examine the relevant case law to resolve whether the right was clearly established. This necessarily includes a determination of whether racially motivated conspiracies against whites are covered under § 1985(3). If it was not clearly established that whites as a class were within the purview of § 1985(3) in 1983, then there is no clearly established constitutional violation.

In denying qualified immunity to Rice on this issue, the district court relied on the language of this Court's decision in *Grimes v. Smith*, 776 F.2d 1359, 1365 (7th Cir. 1985), where we stated that "in *Griffin*, it was made clear that racially motivated conspiracies were prohibited under Section 1985(3)." The district court reasoned that since § 1985(3) prevents racially motivated conspiracies, Rice's reorganization must also be prohibited. However, it does not necessarily follow from *Grimes* that *all* racial discrimination is covered by § 1985(3). Rather, *Grimes* must be read in the light of the Supreme Court's holding in *United Brothers of Carpenters and Joiners v. Scott*, 463 U.S. 825 (1983). Since *Scott* was decided in 1983, it is particularly helpful in determining whether the right was clearly established.

In *Scott*, the Court considered the application of § 1985(3) to a conspiracy by a pro-union group against a group of non-union employees. The conspiracy resulted in a physical attack on the non-union employees, who filed an action for damages under § 1985(3). In addressing these claims the Court decided that the original objective of § 1985(3) was the protection of blacks and their supporters and therefore the action was not proper under § 1985(3). The *Scott* Court, by not recognizing conspiracies motivated by economic or commercial animus, limited the scope of § 1985(3) to cases of racial animus. In its decision, the Court extensively discussed the legislative history and original intent of § 1985(3). Although the Court refused to expand § 1985(3) to actions involving non-racial animus, its discus-

sion regarding the scope of § 1985(3) is particularly relevant in considering whether to expand § 1985(3) to non-blacks. The Court held:

> it is a close question whether §1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans. The central theme of the bill's proponents was that the [Ku Klux] Klan and others were forcibly resisting efforts to emancipate Negroes and give them equal access to political power. The predominant purpose of § 1985(3) was to combat the prevalent animus against Negroes and their supporters.

463 U.S. at 836. After discussing the legislative history of § 1985(3), the Court concluded it would withhold "judgment on the question whether § 1985(3), as enacted, went any farther than its central concern—combating the violent and other efforts of the Klan and its allies to resist and to frustrate the intended effects of the Thirteenth, Fourteenth, and Fifteenth Amendments." *Id.* at 837. *See also Harrison v. Kvat Food Management, Inc.*, 766 F.2d 155, 161 (4th Cir. 1985) (Republicans as a class are not protected by 1985(3)).

After reading *Scott*, it is far from clear whether § 1985(3) extended to protect whites as of 1983. It is well established that "[p]ublic officials are entitled to immunity unless it has been authoritatively decided that certain conduct is forbidden." *Alliance to End Repression v. City of Chicago*, 820 F.2d 873, 875 (7th Cir. 1987). Because we find that the law was not clear in 1983 as to whether § 1985(3) covered whites as a class we cannot say that Rice should reasonably have known that his actions violated the plaintiffs' constitutional rights. Our recent opinion in *Triad Associates, Inc. v. Chicago Housing Authority*, No. 88-1353, slip op. (7th Cir. Dec. 26, 1989), does not mandate a different result. In *Triad*, we expressly determined for the first time that § 1985(3) should extend beyond its "predominant purpose" and cover conspiracies

against whites. This decision fully comports with our holding today, since we do not reach the merits of this claim but merely determine that as of 1983 it was not clearly established that § 1985(3) extended to whites. In fact, *Triad* recognized that the merits of this claim have "not been affirmatively ruled upon by *any* court to date." *Triad*, slip op. at 17 (emphasis added). Since *Triad* is the first decision by any court to precisely address the issue, we are confident in holding that it was not clearly established in 1983 that § 1985(3) extended to whites. In any event, based on *Scott*, the plaintiffs have not met their burden of establishing that the right was clearly established. *See Abel v. Miller*, 824 F.2d 1522, 1534 (7th Cir. 1987). Therefore, Rice is entitled to qualified immunity on this claim.

V.

Turning to Rice's final claim, we review the district court's partial denial of qualified immunity on plaintiffs' cause of action based on an alleged "pattern of harassment and retaliatory treatment by defendant[ ] Rice" since the filing of their complaint. Specifically, plaintiffs allege that Rice engaged in conduct that consisted of retaliatory transfers and a failure to consider them for promotion in violation of their first amendment right to freedom of speech in protecting their right to file this suit. The district court granted summary judgment on the basis of qualified immunity for all acts which occurred on or before June 11, 1984, the date this Court denied rehearing in *Altman v. Hurst*, 734 F.2d 1240 (7th Cir.), *cert. denied*, 469 U.S. 982 (1984). In *Altman*, a police sergeant was reassigned to a less-desirable post after the police chief suspected that the sergeant encouraged another officer to appeal her suspension from the force. After the sergeant filed his complaint, a campaign of harassment was instituted against him. We held that the filing of the sergeant's suit and subsequent retaliation by the police chief were not in violation of plaintiff's first amendment rights be-

cause the speech concerned a private matter rather than issues of public concern. *Altman*, 734 F.2d at 1243-1244.

The district court, in this case, determined that *Altman* clearly established that a lawsuit raising a matter of public concern was speech protected by the first amendment and entitled to protection under § 1985(3). Further findings by the district court determined plaintiffs' suit in this case inherently involved a matter of public concern since it involved a superintendent of police, and accordingly denied Rice qualified immunity after June 11, 1984. Rice claims he is entitled to qualified immunity for acts alleged to have occurred after June 11, 1984, as well, since he alleges that in 1984-1985 it was not clearly established that the first amendment prohibited retaliation for filing a civil rights lawsuit.

In considering this issue the trial court found that there were no cases in 1983 clearly articulating that the mere filing of a lawsuit was an action protected by the first amendment; in fact, the trial court found the case law was to the contrary. The district court concluded the only time a filing of a lawsuit may be protected by the first amendment is when it implicates a matter of public concern. Thus, the trial court identified the threshold inquiry to determine if there was a constitutional right was whether the matter is one of a public or private concern. *See also Altman*, 734 F.2d at 1240.

The district court in the instant case reached its finding by concluding that allegations of race discrimination targeted at a Superintendent of Police of the City of Chicago are inherently matters of public concern and thus denied qualified immunity. *Id.* at 53. However, we find that such a broad analysis is inappropriate. Although it is true that such transfers may be of *interest* to the public, we find that in applying the test established by the Supreme Court in *Connick v. Myers*, 461 U.S. 183 (1983), the actions taken by Rice do not raise an issue of public *concern*. Thus, plaintiffs have failed to state a claim for retalia-

tion and harassment in violation of their first amendment rights to file this lawsuit.[6]

The Supreme Court in *Connick* established the test to determine if an issue involves a matter of public concern. The *Connick* test does not look to what may be conveyed by the employee's speech, but rather, requires a court to look to the reasons the employee is speaking. In *Connick*, an assistant district attorney was fired for insubordination for distributing a questionnaire in the office. The Court, finding that at least one issue in the questionnaire was of public concern, nevertheless concluded the distribution of the questionnaire was essentially an act of insubordination driven by private motive. Therefore, the Court held, the speech involved was motivated solely by private interests. The Court further stated "that when a public employee speaks not as a citizen upon matters only of public concern, but instead as a employee upon matters of only

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[6] As the dissent properly notes in its discussion of this claim, but neglects to accept in its response to our holding regarding plaintiffs' race discrimination claim, intent of the public official is irrelevant to the qualified immunity inquiry of whether a constitutional right is clearly established. However, based on this rule of law, the dissent seeks to show an apparent inconsistency in our use of intent in considering whether this case involves a matter of public concern. The dissent misreads whose intent we are considering. Here we are looking to the intent of the plaintiffs and not the public official, only the latter is barred under qualified immunity analysis. Also, the dissent does not recognize that we do not reach the level of qualified immunity inquiry which precludes us from considering intent in qualified immunity cases. Instead, we find that plaintiffs' first amendment cause of action fails to state a claim since it does not involve a matter of public concern. The consideration of plaintiffs' intent is relevant at this level of the inquiry as determined by the Supreme Court in *Connick*.

Accordingly, because we do not reach the qualified immunity issue, we need not address Rice's claim that it was not clearly established that the first amendment protects the filing of a civil rights lawsuit.

personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Connick*, 461 U.S. at 147.

We believe that the district court's decision, in the instant case, that this was a matter of public concern, was a misapplication of the law. It does not appear from the record that the trial court took note of, or applied, the *Connick* test. Instead, the court concluded that the mere fact that this case concerns a superintendent of police makes this a matter of public concern. However, "[t]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case." *Connick*, 461 U.S. at 149. Nonetheless, the district court reached this result in light of *Altman* where it was determined that even though that case involved a chief of police, it was still purely a matter of personal interest.

This Court has adopted a set of questions to be considered in applying the *Connick* test. In *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985), we decided the essential questions to be considered in deciding this issue are: "was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?" *Linhart*, 771 F.2d at 1010. When answering these questions to determine whether the employee's speech addresses a matter of public concern, the content, form, and context of the statement must be determined as revealed in the whole record. *Connick*, 461 U.S. 147-48.

In *Yatvin v. Madison Metropolitan School Dist.*, 840 F.2d 412, 419-20 (7th Cir. 1988), we adopted the *Linhart* inquiry and determined that the filing of a lawsuit alleg-

ing retaliation for filing a sex discrimination complaint against a school district was not activity protected by the first amendment because the filing of the suit was not a matter of public concern. The plaintiff in *Yatvin* only "wanted to advance her career, not promote a cause." *Id.* at 419. So too is it apparent in this case that the plaintiffs in filing their complaint were merely challenging their demotions and transfers rather than trying to raise an issue of public concern. They sought to advance their careers and receive compensatory and punitive damages for the alleged wrongs. It was not their central intention to promote a cause of public concern. Race discrimination is a matter of public concern, but the plaintiffs did not seek to debate race discrimination. They were solely interested in advancing their own private employment interests.[7] *See Yatvin*, 840 F.2d at 419-20.

Although the subjective intent of the parties may be difficult for an appellate court to determine, we believe that, as was the case in *Yatvin*, this lawsuit "does not seek relief against *pervasive or systematic misconduct by a public agency or public officials*, and, . . . is not part of an overall effort by the plaintiff[s] . . . to correct allegedly unlawful practices or bring them to public atten-

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[7] The dissent maintains that since this suit was filed against "one of the nation's most important metropolitan police forces" it naturally implicates the public interest. We acknowledge that this case may interest the public, but respectfully suggest that the dissent employs the incorrect focus under the law. The critical issue is whether the suit involves a matter of public *concern*, not simply one of public *interest*. These are two significantly different inquiries. A topic that is of interest to the public may be determined, as the dissent notes, by viewing the local newspapers. However, a matter of public concern must be detected under the test established by the Supreme Court in *Connick* and its interpretations by this Court. Such an analysis requires a determination of the plaintiffs' purpose in bringing this suit, as is discussed more fully in the text.

tion." *Yatvin*, 840 F.2d at 420 (emphasis added). Therefore, we find that the district court incorrectly held that the alleged harassment and retaliation stemming from the filing of the plaintiffs' complaint was a matter of public concern. Since only lawsuits that present matters of public concern may have first amendment protection, and we have determined that this is not such a case, we find that *Connick* mandates the dismissal of plaintiffs' action for failure to state a claim. *Altman*, 734 F.2d at 1244.

## VI.

Accordingly, we hold that, Superintendent Rice is entitled to summary judgment based on qualified immunity on plaintiffs' counts of race discrimination, and conspiracy to violate their civil rights. We also find that plaintiffs have failed to state a claim on their allegations of retaliation in violation of their first amendment rights. Therefore, in accordance with this opinion, we REVERSE the district court on these counts and enter summary judgment in favor of Rice accordingly.

WOOD, JR., *Circuit Judge*, dissenting. This is not an easy case in which to administer the accepted principles of law, with which I have no disagreement, applied by the majority. It is only in the application of those principles to the facts of this case which causes me, in part, to respectfully dissent.

In Count III the eighteen white plaintiff high-ranking police officers charge that they were demoted because of race, and that black officers were advanced to positions which had previously been held by them. Former Superintendent Rice, also a black, absolutely denies his decision was based on race. Rather, he explains it was done only to advance people who embraced "his philosophy," and "accepted his management style." What that philosophy and management style may have been, or how it was determined that these plaintiffs neither embraced or accepted whatever there was to embrace or accept, is not explained. Ability to perform as police officers clearly appears not to have been a factor as Rice stated he had no reason to believe that the replaced plaintiffs would not have continued to do a good job.

The majority agrees, and so do I, with the decision of the district court insofar as it held that the plaintiffs sufficiently alleged a constitutional violation based on racial animus. The next step, however, the qualified immunity inquiry, is where we begin to part company. The majority correctly explains that the right alleged to have been violated must be clearly established at the time and be characterized with particularity. The contours of that right are required to be sufficiently clear to enable a reasonable official to understand that what he contemplates doing may violate that right. The majority rejects plaintiffs' characterization of the clearly established right at issue.

Plaintiffs complain that their demotions and the promotions of the substitute officers were based on race and therefore violated their equal protection rights. That is too general a charge for the majority but not for me when

viewed as it must be in its factual context. As the majority recounts, Rice reorganized the top management of the Chicago Police Department. Twenty-five white officers were demoted although only eighteen of them joined as plaintiffs in this suit. Not a single black officer was demoted, but thirteen black officers and no white officers were promoted to the vacancies created by the white demotions. It seems to me that the top police officer of a large metropolitan police force, considering Rice and others similarly situated, objectively and reasonably would or should have known that what was being done would likely violate a right of the plaintiffs. High police officials are experienced to some extent in legal issues and constitutional rights. More therefore can reasonably and objectively be expected from top police officials than, for instance, from a mere supervisor in some other ordinary government office. Rice and other police superintendents ordinarily have access to legal advice within the municipality. The majority states the issue to be whether a reasonable superintendent of police could have concluded that he could take race into consideration for his reorganization. It seems to me a little more than just "taking race into consideration" when all whites are out and all blacks are in, but that states the issue fairly enough.

The majority then proceeds to create what is in effect an affirmative action defense for Rice, but he made it very plain he claimed none. He had not approached the reorganization on that basis and had done no affirmative action statistical analysis or anything else for affirmative action purposes. In fact, Rice explained that if he had injected any factors other than efficiency and effectiveness into the top command structure, he would have been doomed to failure as a superintendent. Rice not only denies that race was a factor, but offers the explanation that his reorganization only had to do with his own philosophy and style, not race or anything else. The majority, nevertheless, creates for Rice a paper-mache affirmative action defense just for the purposes of granting qualified immunity. In

disagreeing with the majority's qualified immunity affirmative action approach in these circumstances I do not mean or intend to disparage affirmative action in the slightest. I fully support affirmative action appropriately applied. To justify what it does the majority cites a number of cases which we need to examine.

*Cygnar v. City of Chicago*, 865 F.2d 827 (7th Cir. 1989), is viewed by the majority as its pattern for what it does. In the present case, however, *Cygnar's* significant factual distinctions are discounted. In *Cygnar*, 865 F.2d at 844, this court held that the state of the law at about this same time did not clearly prevent that defendant from transferring those plaintiffs based upon their race to correct what the *Cygnar* defendant perceived to be a statistical under-representation of minorities in the office. Therefore, it was held that the defendant was entitled to qualified immunity as the criteria had been met, perhaps unwittingly, for a valid affirmative action plan under *Lehman v. Yellow Freight Systems, Inc.*, 651 F.2d 520 (7th Cir. 1981). In *Cygnar*, 865 F.2d at 835-36, however, there was evidence to suggest such a course. A very pertinent memo had been sent to his supervisor by the defendant who had instituted the racial transfers. That memo informed his supervisor that he was assuming command of the "affirmative action posture" of his new office. Thereafter in the memo was set out an office personnel listing showing race. In view of the apparent disparity in the listing, that defendant concluded that affirmative action did not exist in the department and that something would be done about it, and it was. A follow-up memo indicated progress in correcting the racial imbalance. As this court noted in *Cygnar* that defendant also testified that he instituted the transfers not because of a discriminatory animus but to bring in people he knew and trusted.

It can, therefore, be seen that in *Cygnar* this court had something factual to go on to objectively support its view, but there is no similar factual support in this present case. A pseudo affirmative action-qualified immunity defense is

manufactured only out of air. The majority supplies Rice with a statistical disparity backup which he did not have, did not use, or even want at the time. It is more than just a matter of Rice's intent, expressed or unexpressed. He offered under oath his only explanation of why he took the official actions that he did. What the majority creates in these particular circumstances, quite apart from Rice's expressed intent, which exonerates Rice without trial is for me just too contrived and artificial.

The *Harlow* objective legal reasonableness standard is the best standard that can be conceived, but I believe it is being unrealistically carried too far in the present factual circumstances. It affords a "reasonable superintendent of police," viewing the matter objectively, more protection than a reasonable superintendent of police at that time should have needed. I would therefore affirm the district court on this count although our approaches to the issue vary somewhat.

Count IV raises the issue of Rice's qualified immunity in the context of an alleged violation of plaintiffs' civil rights under 42 U.S.C. § 1985(3). The majority allows Rice qualified immunity as it is determined that at that time the law was not clear as to whether section 1985(3) covered whites as a class for qualified immunity purposes. I agree with that analysis, and therefore join that part of the opinion.

The final issue is raised by Count V of the amended complaint which alleges a pattern of harassment and retaliatory treatment by Rice, specifically that he subjected some of the plaintiffs to retaliatory transfers and denial of consideration for promotion in violation of their first amendment rights to freedom of speech in protecting their right to file this very civil rights suit. The district court granted summary judgment on the basis of qualified immunity for acts prior to but denied it after the date of our decision in *Altman v. Hurst*, 734 F.2d 1240 (7th Cir.), *cert. denied*, 469 U.S. 982 (1984). *Altman* established that

retaliation for filing a civil law suit dealing with a matter of public concern was conduct protected by the first amendment. *Altman* involved a suit by a single police sergeant complaining about an undesirable reassignment. The sergeant also alleged that he was harassed for encouraging another officer to appeal her suspension from the force. This court held defendant's actions not to be a first amendment violation because plaintiff's speech was only a private internal matter and not a matter of public concern.

I agree with the *Altman* holding, but the present case is much more than that. The majority finds no public interest based in part on *Connick v. Myers*, 461 U.S. 135 (1983). *Connick* involved a single public employee who distributed a questionnaire within his own office. That was considered by his supervisor as insubordination motivated only for a private motive, except with a limited exception, and therefore not protected.

I do not find in *Connick* that the Supreme Court directs us to look only to the reasons the employee spoke out to determine whether there is a matter of public concern or not. *Connick* holds that the employer need not tolerate the employee's insubordination, disruption of the office, and destruction of working relationships. *Id.* at 152. There was no disruption or destruction by the plaintiffs in the present case. No fault was found with them. Also in *Connick* the manner, time, place, and context are found relevant and significant. In *Connick* the plaintiff was transferred based on internal matters, then plaintiff's suit followed. In the present case the alleged retaliation followed from plaintiffs banding together to bring the acts of the superintendent to the attention of the federal court. *Connick* found that the circulated and disruptive interoffice questionnaire touched in part on a matter of public concern because of a single question, among many other irrelevant questions, that inquired about political pressure in their jobs. *Id.* at 149. That *Connick* finding is reached without any finding that the employee's reason for circulating the questionnaire which contained that one question

was only for a public and not a private concern. The Court held it "apparent" that the issue was a matter of interest to the community. *Id.* at 149. In this present case, the majority finds no public interest merely because it finds it was not the central intention of plaintiffs to promote a cause of public concern. Plaintiffs, it is assumed, were only concerned with their own private employment interests. This present case is much more than the *Connick* questionnaires one political question held to be of public concern.

Rice's "intent" in the qualified immunity context is quite properly immaterial, but on the other hand the personal intent of plaintiffs in this context is found by the majority to be the only controlling factor. It is, of course, obvious that plaintiffs have a personal financial interest in this law suit. These white officers held ranks and positions noted by the majority to be "the highest level managers of the Chicago police department, and who helped create and execute police policy in the supervision and direction of over 15,000 police employees." Nevertheless, the majority does not find enough to interest the public in what was done allegedly because this suit had been filed challenging the demotions and promotions for reasons other than merit at the highest level of one of the nation's most important metropolitan police forces. If the public was not concerned about this type of police reshuffling and the alleged retaliation which could impact for better or worse on its safety and welfare, then it should have been, but I think the public was interested.[1]

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[1] It seems, however, that others viewed the police reshuffling as a matter of considerable public interest. When it happened it was a front page story in the *Chicago Tribune* on December 3, 1983. It was reported in a two-page article that the police "department's top commanders got new jobs Friday from Superintendent Fred Rice in the biggest department shake-up in recent history." One of the plaintiffs, Larry Forberg, Commander of the Narcotics Section, is quoted as speaking out strongly against his demotion and

(Footnote continued on following page)

The majority also cites *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985), as support for its view, but that is only a case of a disgruntled acting chief of police who tried to maneuver his appointment as the permanent chief. Instead of the appointment he received only a letter of reprimand for his personnel file. I agree with that decision, but it is likewise of little guidance when contrasted with the present factual circumstances. *Yatvin v. Meadesor Metropolitan School District*, 840 F.2d 412 (7th Cir. 1988), is also cited by the majority. It is likewise a decision I find no fault with, but again it is so factually distinguishable as to be of little help. *Yatvin* involved the principal of a public school who complained about the denial of two promotions she had sought. She claimed that she lost the first promotion because of her sex and that she lost the second promotion in retaliation for her filing a sex discrimination charge after losing the first promotion. These facts were found not to raise a matter of public concern because, in essence, *Yatvin* made no attempt "to distinguish this case from the run-of-the-mine [*sic*] single-plaintiff discrimination case." 840 F.2d at 420. That situation, however, is far from the present case where a large number of high-ranking white police officers with important public responsibilities were demoted and replaced by black officers, and then were allegedly harassed for filing this federal civil rights suit. There is public significance in this present case because it involves a most important public agency and very sensitive and significant racial changes which could affect the public generally. This case is of much greater public significance than the cases the majority uses as precedents to dispose of it.

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[1] *continued*
transfer. He recited the awards he had been given for his narcotics work by the federal government. Even before it happened it made news in the *Chicago Tribune* as something sources said was about to happen. There was a photograph of Rice. *Chicago Tribune*, Dec. 2, 1983, § 3, at 1, 3. It is not surprising that this police shake-up got public attention from the beginning.

I do not intend to suggest any opinion whatsoever about plaintiffs' allegations on their merits. My view is only that I do not believe that Counts III and V are ready for summary judgment on the basis of the qualified immunity of Rice, or dismissal for failure to state a claim because of the majority's determination that it is not a matter of public concern. The last thing I would suggest is that the federal court just second-guess public officials in the way they administer their offices. Qualified immunity for public officials is an absolutely essential protection for them, but in the way the majority applies it here in Count III it could become more than a shield to protect public officials from the disruption of trials. It could become a shield for the activities of public officials for which they should reasonably have anticipated being later held to answer. As I read *Connick* in regard to Count V it supports plaintiffs. This present case is more than a reflection of "one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre," much more. 461 U.S. at 148. Count V does not deserve to be dismissed.

I would prefer to affirm the district court on Counts III and V, and so to that extent I respectfully dissent.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

# APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 11, 1990.

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

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JOHN AURIEMMA, DANIEL COLL, MARSHALL CONSADINE, RENALDO COZZI, KENNETH CURIN, RUSSELL DITUSA, THOMAS FARAGOI, LAWRENCE FORBERG, JOHN HINCHY, KATHRYN KAJARI, GEORGE MARCIN, PATRICK MCDONOUGH, WALTER MURPHY, JOHN RAFTER, DOMINIC RIZZI, JAMES STAMPNICK, THOMAS WALTON and ROGER WHALEN,

*Plaintiffs-Appellees,*

No. 89-1479 *v.*

FRED RICE,

*Defendant-Appellant,*

and

CITY OF CHICAGO,

*Defendant.*

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B. 2

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 1224—**James F. Holderman**, *Judge*.

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## ORDER

A majority of judges in active service have voted to rehear this case *en banc*. Accordingly,

IT IS ORDERED that rehearing *en banc* be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that the judgment and opinion entered in this case on February 6, 1990 be, and are hereby, VACATED. This case will be reheard *en banc* on May 30, 1990 in the morning session.

# APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 89-1479

JOHN AURIEMMA, DANIEL COLL,
MARSHALL CONSADINE, RENALDO COZZI,
KENNETH CURIN, RUSSELL DITUSA,
THOMAS FARAGOI, LAWRENCE FORBERG,
JOHN HINCHY, KATHRYN KAJARI,
GEORGE MARCIN, PATRICK MCDONOUGH,
WALTER MURPHY, JOHN RAFTER,
DOMINIC RIZZI, JAMES STAMPNICK,
THOMAS WALTON, and ROGER WHALEN,

*Plaintiffs-Appellees,*

*v.*

FRED RICE,

*Defendant-Appellant,*

and

CITY OF CHICAGO,

*Defendant.*

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 1224—**James F. Holderman,** *Judge.*

ARGUED SEPTEMBER 11, 1989—
REARGUED *EN BANC* MAY 30, 1990—
DECIDED AUGUST 20, 1990

Before BAUER, *Chief Judge*, CUMMINGS, WOOD, JR., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, and KANNE, *Circuit Judges*.

WOOD, JR., *Circuit Judge*,[1] joined by CUMMINGS, POSNER, COFFEY, EASTERBROOK, RIPPLE, and MANION, *Circuit Judges*.

This case was brought by eighteen white officers of the Chicago police department who were demoted by defendant Fred Rice, a black former superintendent of the Chicago police department. Plaintiffs claim they were demoted because of their race in violation of the equal protection clause of the fourteenth amendment and 42 U.S.C. §§ 1981, 1983, and 1985(3).

In the original and now-vacated opinion, a divided panel relied on the doctrine of qualified immunity to reverse the district court and enter summary judgment in favor of defendant Fred Rice. *See Auriemma v. Rice*, 895 F.2d 338 (7th Cir. 1990). Now, a divided *en banc* court affirms the district court denying Rice qualified immunity on counts III and V and reverses on count IV where the district court had denied him qualified immunity.

## I.

The late Mayor Harold Washington in August 1983 appointed Fred Rice superintendent of the Chicago police department. On December 2, 1983, Rice reorganized the top management ("exempt rank") positions of the police department. The exempt rank officers are the highest level managers of the Chicago police department; they create and execute police policy in the supervision and direction of over 15,000 police employees. As part of that reorganization, Rice reassigned or demoted twenty-five white officers from the exempt ranks, demoted no black

[1] Portions of this opinion have been adapted from the original panel opinion, with Judge Flaum's very kind permission even though he disagrees with the results reached in parts III and V.

officers, but promoted thirteen black officers to the exempt ranks.[2] It is argued that some reorganization is customarily expected from new superintendents, but it is not argued that it is customary to do so on this allegedly racial basis, at least in the absence of an affirmative action plan. Rice, however, absolutely denies his reorganization decision was based on race. Rather, he explains, it was done only to advance people who embodied "his philosophy" and "accepted his management style."

Plaintiffs, the victims of Rice's reorganization, followed their demotions with their five-count complaint in this case. In count I, the plaintiffs alleged the demotions violated their fourteenth amendment rights to due process of law; plaintiffs subsequently dismissed this claim voluntarily. Count II alleged that the plaintiffs were demoted for "political reasons." The district court granted summary judgment on this claim finding that Rice was entitled to qualified immunity because "it's not a constitutional violation to make employment decisions based upon political affiliations when party affiliation is an appropriate requirement for effective performance of the public office involved." This ruling has not been appealed. In count III, plaintiffs allege under 42 U.S.C. §§ 1981 and 1983 that race was "a substantial or motivating factor" in Rice's decision to demote them in violation of the fourteenth amendment. Plaintiffs contend that the white officers' demotions and the black officers' promotions were carried out pursuant to a nonaffirmative action plan, adopted by Rice, but nonetheless based on the officers' races. The district court denied summary judgment to Rice, finding that it was clearly established that a public official making decisions similar to Rice could not use race for making employment determinations. In count IV, plaintiffs allege that Rice engaged in a conspiracy to violate their civil rights in violation of 42 U.S.C. § 1985(3). The district court likewise denied Rice qualified immunity on

[2] Not all the affected white officers joined in this suit.

this count, holding that "the law was clear in 1983 that all racial discrimination . . . was clearly covered by Section 1985(3). . . ." The plaintiffs finally claim, in count V of an amended complaint, violations of their first and fourteenth amendment rights for "harass[ment] and retaliat[ion] against police officers who have filed federal lawsuits against" Rice. On this final count, the district judge granted summary judgment on the basis of qualified immunity for Rice's acts up to and including June 11, 1984, when this court denied rehearing *en banc* in *Altman v. Hurst*, 734 F.2d 1240 (7th Cir.), *cert. denied*, 469 U.S. 982 (1984). Accordingly, Rice's motion for qualified immunity on count V was denied for all actions after June 11, 1984, "when it was clearly established [by *Altman*] that retaliation for the filing of a civil lawsuit dealing with a matter of public concern was conduct protected by the First Amendment to the Constitution."

II.

The issue on appeal is whether Rice is entitled to summary judgment based on qualified immunity. Summary judgment is the proper manner to resolve a qualified immunity issue as soon as possible because it protects "government officials from the costs of trial and burdens of discovery, whenever possible . . . ." *Rakovich v. Wade*, 850 F.2d 1180, 1205 (7th Cir. 1988) (*en banc*), *cert. denied*, 109 S. Ct. 497 (1988); *see also Harlow v. Fitzgerald*, 457 U.S. 800 (1982). "Under the doctrine of qualified immunity, public officials performing discretionary functions are protected against suits for damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known." *Doe v. Bobbit*, 881 F.2d 510, 511 (7th Cir. 1989) (citing *Harlow*, 457 U.S. at 818), *cert. denied*, 110 S. Ct. 2560 (1990). Thus, "[t]he general rule of qualified immunity is intended to provide government officials with the ability 'reasonably [t]o anticipate when their conduct may give rise to liability for damages.' " *Anderson v. Creighton*, 483 U.S. 635 (1987) (quoting *Davis v. Scherer*, 468 U.S. 183,

195 (1984)). Correspondingly, the inherent purpose of qualified immunity is to protect government officials from nonmeritorious lawsuits. Were it not for the qualified immunity issue in this case, the disputed race factor in the reorganization would clearly not be appropriate for summary judgment.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court enunciated the standard to be applied in qualified immunity cases. The Court held that the official's entitlement to qualified immunity "focuses on the objective legal reasonableness of an official's acts." *Id.* at 819. "In *Harlow*, the Supreme Court eliminated the subjective or good faith element from the qualified immunity analysis and held that 'government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Polenz v. Parrott*, 883 F.2d 551, 553-54 (7th Cir. 1989) (quoting *Harlow*, 457 U.S. at 818). In *Rakovich*, this court has also stated that "under *Harlow* an objective immunity analysis at the summary judgment stage prior to discovery does not include an *evaluation* of intent. This is because evaluating intent would be a factual analysis, whereas the objective inquiry is a legal question." *Rakovich*, 850 F.2d at 1210 (emphasis in original). Such an interpretation is consistent with *Harlow*'s approval of deciding qualified immunity cases by summary judgment because "[a]n objective analysis is less fact bound than a subjective analysis, making summary judgment a practical and effective means of terminating unnecessary litigation." *Id.* at 1205. "Thus . . . a qualified immunity analysis entails a purely objective inquiry to determine whether at the time of the alleged illegal act, the right asserted by the plaintiff was clearly established in the particular factual context presented." *Polenz*, 883 F.2d at 554 (citing *Cleveland-Perdue v. Brutsche*, 881 F.2d 427 (7th Cir. 1989)), *petition for cert. filed*, 58 U.S.L.W. 3491 (U.S. Jan. 24, 1990). It is with such an objective approach in mind that we review this case.

In light of *Harlow*, however, we note that the Supreme Court has not yet fully explored a court's inquiry in applying an objective analysis to a claim that depends on the official's state of mind. *See Benson v. Allphin*, 786 F.2d 268, 276 n.19 (7th Cir. 1986), *cert. denied*, 479 U.S. 848 (1986). This case presents such a dilemma, because alleged racial discrimination, violation of civil rights, and retaliation all inherently involve the intent of an official to discriminate. This court, however, has developed an analysis for the proper inquiry to be undertaken. We have cautioned:

> It is a mistake to read *Harlow* too broadly. The elimination of intent from the formula does not mean that the *Harlow* Court sought to limit civil rights actions to those where state of mind was *not* a part of the substantive law. *Harlow* merely states that intent must not be *evaluated or weighed* through a factual inquiry, which would reduce the likelihood that qualified immunity could be decided in a motion for summary judgment.

*Rakovich*, 850 F.2d at 1210 (citations omitted & emphasis in original). Therefore, despite the apparent *Harlow* paradox, an objective analysis is applicable to situations involving a public official's state of mind. The objective determination in these cases requires that courts not consider intent when making the final determination at summary judgment of whether the law is clearly established.

We are more explicitly guided in applying the objective standard to this case by the approach taken in *Wade v. Hegner*, 804 F.2d 67 (7th Cir. 1986). In *Wade*, we held that *Harlow* calls for the district court to conduct a two-part analysis when state of mind is at issue: "(1) Does the alleged conduct set out a constitutional violation? and (2) Were the constitutional standards clearly established at the time in question? . . . Intent is relevant to (1) but not to (2)." *Id.* at 70. Thus, when intent is crucial to a party's claim, as it is in this case, the court's consideration of intent is relevant to the determination of whether

a constitutional violation exists but not in deciding if the constitutional standard was clearly established. We stated in *Polenz* in applying *Wade* that

> where a particular state of mind (*e.g.*, intent, discriminatory motive, retaliatory motive) is an element of the alleged constitutional violation, and the qualified immunity issue arises at the summary judgment or directed verdict stage, in order to answer the step one inquiry, the court must determine whether the plaintiff has factually supported the allegations as to the state of mind element. We made clear, however, that the defendant's subjective state of mind is not relevant to the determination of question two.

*Polenz*, 883 F.2d at 554 (footnotes omitted).

In *Halperin v. Kissinger*, 807 F.2d 180 (D.C. Cir. 1986), Justice Scalia, just after his elevation to the Supreme Court, addressed this subject of intent in the national security context. He fully discussed the situation when clearly established law makes the act legal or illegal depending upon the intent with which the act was performed. 807 F.2d at 184. We read *Halperin* as being in general agreement with our later case in *Wade*. *See also Martin v. D.C. Metro. Police Dep't*, 812 F.2d 1425, 1433 (where intent is an element of the alleged constitutional offense, the plaintiff must be allowed opportunity to offer proof of defendant's illicit motive), *vacated in part*, 817 F.2d 144, *original opinion reinstated*, 824 F.2d 1240 (D.C. Cir. 1987). In the present case, we are past some of the problems discussed in *Halperin*, because this case had progressed to the point of being set and ready for trial before Rice raised the qualified immunity issue. Defendants, so far as the first prong of *Wade* is concerned, concede in their brief, assuming the truth of the allegations, that the district court was arguably correct in concluding that the plaintiffs sufficiently alleged a constitutional violation based on racial animus. We are left with the *Wade* second step of determining objectively whether that constitutional violation was clearly established at the time.

This circuit has addressed and attempted to clarify the ambiguities and difficulties in the qualified immunity analysis. Having thus examined the relevant legal principles, we now consider Rice's claim to qualified immunity under each of the remaining counts. This court is not divided by what the law is believed to be, but only by the law's application in the circumstances of this case.

## III.

We begin by considering Rice's entitlement to qualified immunity under the plaintiffs' race discrimination claim, count III. It is alleged that the plaintiffs were excellent officers and previously had not been the subject of any complaint or disciplinary action, but to the contrary, all plaintiffs had received numerous awards and commendations from the police department and the city of Chicago. At the time this reorganization was undertaken, Rice advised plaintiffs they had done excellent jobs, served well, and that there were no criticisms. No explanation, however, was given to plaintiffs by Rice for his actions. Plaintiffs allege, however, that race was the unspoken explanation, all in accordance with a plan between the late Mayor Washington and Rice to harass and demote these white officers to make their positions available to black officers.

Almost five years after the case had been instituted and not long before trial was scheduled, Rice belatedly raised his qualified immunity defense by motion for summary judgment. At the argument on Rice's summary judgment motion, the district judge over a two-day period thoroughly explored the immunity issue with counsel. Considering that the trial was scheduled to begin, the district judge orally ruled from the bench denying summary judgment to Rice on the basis of qualified immunity. The district judge noted that a reasonable superintendent who in determining whether the contemplated reorganization was legal would have had to take into account something that Rice claims he did not, and that was race. During the argument, Rice's counsel argued that Rice was being "truthful, not cagey," when he said he did not take

race into consideration. There was then a short general discussion about possible perjury, but the district judge necessarily came to no conclusion whether Rice was being truthful in his denial of racial consideration. Plaintiffs maintained that because Rice denied race was a factor and did not raise an affirmative action defense, he was precluded from relying on the state of affirmative action law to determine if a constitutional violation was clearly established and thereby creating a qualified immunity defense.

The district judge explained that he was considering the allegations of the complaint, looking at the constitutional right specifically alleged as having been violated and looking to "the reasonableness of the action, as to whether a reasonable public official would have known, based upon the law as established at that time, whether the action taken as alleged in the complaint violated a clearly established constitutional right." He concluded that it was clearly established based upon objective criteria, that a public official could not use race for making employment determinations and therefore denied qualified immunity. The ruling of the district court cannot fairly be characterized as based only upon Rice's subjective intent or state of mind, but it appears to be based upon the law applied to the facts alleged and known at that stage of the proceeding. There was admittedly no evidence of any affirmative action plan: no racial analysis had been done, and no affirmative action purpose in any degree was claimed. Faced with these objective facts about the white demotions and black promotions outside any affirmative action context and quite apart from Rice's subjective intent, there was no basis for the district court to proceed to consider the state of affirmative action law.

There is no disagreement in this court that the *Wade* interpretation of *Harlow* is to be applied. It is agreed that intent is crucial to a plaintiff's claim but relevant only in determining whether a constitutional violation exists under part one of the *Wade* approach. Nor is there disagreement in this court that plaintiffs sufficiently alleged

a constitutional violation in their demotions based on racial animus considering at this stage that plaintiffs' allegations are true. The application of the *Wade* step 2, however, is where the court divides, not on the law but in its application to this case. It is accepted that consideration of intent is not relevant in determining if the constitutional standard allegedly breached was clearly established.

We must be careful to properly characterize with particularity the right in question. In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court defined the necessary specificity to be considered in determining the particular constitutional right, emphasizing that the identification of clearly established right is not to be determined in broad terms. *Id.* at 639; *see also Cygnar v. City of Chicago*, 865 F.2d 827, 843-44 (7th Cir. 1989). The *Anderson* Court was concerned that by merely pleading a violation of an extremely abstract constitutional right plaintiffs could easily get into court, proceed to trial, and thwart the good intentions of qualified immunity. *Davis v. Scherer*, 468 U.S. 183, 195 (1984). "It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. Only by defining the right in these terms will a court properly address the major concerns of *Harlow*.

This court disagrees among itself about whether plaintiffs' allegations that they, high-ranking white officers who were demoted without any just cause or complaint about their professional performance but only because of race so as to make their police supervisory command positions available to be filled by black officers, violated the equal protection clause of the Constitution, and in particular 42 U.S.C. §§ 1981 and 1983. We do not view those allegations to be so general as to run afoul of *Anderson* on the grounds that they do not provide a sufficient basis for a reasonable official to understand what he was doing violates

that right. The test for immunity is whether the law is clear in relation to the specific facts confronting the public official when he acted. *Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir.) (*en banc*), *cert. denied*, 109 S. Ct. 497 (1988). "[E]ach of the federal courts of appeals [has] implied that the defendant's knowledge is to be measured against that of the reasonable person in her circumstances, or the reasonable police officer/prison warden/teacher, etc." Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 618 (1989). In general terms what we have in this case is whether a reasonable police chief of a large metropolitan police force should be able to understand that he could not substitute on a wholesale basis black for white officers in high command positions without some fair cause or reason and certainly not on the basis of racial animus. It is not expecting too much from a reasonable superintendent of police to come to the conclusion that the kind of alleged racial discriminatory action charged here, whether black or white, has not just recently been found to be unsupportable.

It is in effect conceded that race discrimination for race's sake is not to be tolerated in government employment. Writing for himself in a case in which no single justice spoke for the court, *Regents of the University of California v. Bakke*, 438 U.S. 265, 289-90 (1978), Justice Powell wrote in general that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." Justice Powell, however, agreed with other members of the court that race could be taken into account in the school admission context depending on affirmative action factors. That, in part, explains why the defense in the present case attempts to turn to affirmative action law. There was, however, absolutely no foundation in fact for any affirmative action defense, and none was directly claimed. Whether qualified immunity can be invoked on an affirmative action concept is therefore the issue.

We are urged by Rice to eliminate his subjective intent, whatever in fact it was, from the qualified immunity analysis and consider the state of affirmative action law in 1983, granting qualified immunity on that basis regardless of the absence of any factual basis. There is no claim that there was in existence on an objective, even on a subjective basis, any sort of an affirmative action plan or purpose whatsoever that might have led a reasonable superintendent to believe he was therefore doing something proper, not improper. *Anderson* required only that the contours of the right be sufficiently clear that a reasonable official would understand that what he is doing violates that right. 483 U.S. at 640. The Court then explained the limits on that requirement. Qualified immunity does not protect official action just because the very action in question has not previously been held unlawful. It is only required that in the light of preexisting law the unlawfulness of the action is apparent.

Our case, *Cygnar v. City of Chicago*, 865 F.2d 827 (7th Cir. 1989) does not lend itself to application in the present case so as to totally fictionalize the creation of qualified immunity for Rice. *Cygnar* is not a ticket to the land of make-believe. To go beyond the facts of *Cygnar* and spread its reasoning over entirely different circumstances makes a fool of the law. *Cygnar* likewise involved white and black police officers in the City of Chicago Office of Municipal Investigation ("OMI"). When former Chicago Mayor Harold Washington appointed a new director of that agency, the new director quickly conducted a survey of the gender and race of the office staff and reported by memo to his superior on the racial makeup. He advised that "affirmative action concepts do not exist in this department." He further advised that due to constraints on civil career service staff personnel to resolve that imbalance could only be a long-range goal, but as to the police personnel it would be dealt with immediately, and it was. A majority of those who replaced the demoted white officers were black. Rice, also a defendant in the *Cygnar* case, has had his share of legal problems involv-

ing race. The supervisor in *Cygnar* denied racial or discriminatory animus and claimed only that he acted out of a legitimate desire to "bring in his own people." 865 F.2d at 832. However, as a further defense, although an inconsistent one, it was claimed that the supervisor was in good faith attempting to institute an affirmative action plan. This court held the affirmative action defense failed because the city proffered no evidence of past discrimination or statistical comparison establishing a manifest imbalance between the relevant area labor pool of officers qualified to perform sensitive investigations of city corruption, and the present personnel of the agency. The court went on to hold, 865 F.2d at 844, that although the supervisor's conduct may well violate today's constitutional law standards, that there was no case law at the time clearly preventing the supervisor from trying to correct what he perceived to be a statistical under-representation of minorities in his office. We therefore held that the supervisor was entitled to qualified immunity on plaintiff officers' racial discrimination claims.

In *Cygnar*, in contrast to the present case, there was something factually to build on: there appears to have been an embryonic affirmative action plan or purpose even though deficient. But in this present case there is absolutely no evidence factually supportive of an affirmative purpose. The *Cygnar* facts do not exist because Rice has made it very plain there was no affirmative action rationale. The reorganization was not approached on that basis. There is therefore no evidence or claim of any affirmative action statistical analysis, or of past discrimination, or anything else for affirmative action purposes. In fact, Rice explained that if he had injected race and any factors other than efficiency and effectiveness into the top command structure, he would have been doomed to failure as a superintendent. In these circumstances based on the facts of what happened, leaving to one side Rice's subjective intent, there is nothing, except judicial air, upon which to construct for Rice what would be a species of a nonexistent affirmative action for qualified immunity purposes.

We do not see how the correct portrayal of the specific right alleged to have been violated involving race can be correctly characterized, as this court's now-vacated opinion characterized it, as whether a reasonable superintendent of police could have concluded that he could take race into consideration for a limited reorganization of the exempt ranks of the police department. That formulation does not bear an accurate "relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow.*" *Anderson*, 483 U.S. at 639. That formulation, it has been argued, does not preclude the court from considering the state of affirmative action law merely because Rice lacked the subjective intent to implement an affirmative action plan. There is more in the present case than just "taking race into consideration." That formulation of the right does not fit this case although it might fit others.

We believe the issue can be more particularly stated to fit the facts and circumstances of this case as required by *Anderson*. The issue as we see it is "whether in 1983 a reasonable superintendent of a major metropolitan police force could have reasonably concluded that he could reorganize the police department's highest level managers by reassigning or demoting twenty-five white officers from the exempt ranks, but demoting no black officers, and then promoting thirteen black officers into the new vacancies created by the white demotions, all in the total absence of any affirmative action concept or criteria, defective or otherwise."[3]

Race is and has been for a long time a very sensitive issue in this country. No reasonable police chief could have objectively and reasonably concluded that he could do on a wholesale basis what Rice did and not thereby violate the rights of the white officers. Any police chief who thought he could demote and promote only along allegedly clear racial lines could not be a reasonable police chief.

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[3] It is too late on appeal to supply figures of disparity in the exempt ranks, figures Rice did not have, use, or want.

Even Rice acknowledged that if he had injected race into the reorganization he would be doomed to failure as a superintendent. What in fact happened is another matter. The case now goes to a jury so that it can decide whether the plaintiffs' allegations are true.

## IV.

We turn next to plaintiffs' allegations that Rice's actions violated their civil rights under 42 U.S.C. § 1985(3).[4] The district court also denied Rice qualified immunity on count IV.

In analyzing this count, we must apply the same qualified immunity analysis as previously discussed. We again use the same inquiry as framed above to determine if a reasonable superintendent of police of a large metropolitan

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[4] 42 U.S.C. § 1985(3) provides as follows:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

force should have clearly known that what he did would violate the rights of plaintiffs. The pivotal question under 42 U.S.C. § 1985(3) is whether it was clearly established in 1983 that whites as a class came within the protection of the statute. If not, Rice is entitled to qualified immunity on this particular charge. So far as the conspiracy requirement is concerned, it is alleged that the demotions of the white officers for the benefit of black officers were part of a plan and agreement between former Mayor Washington, Rice, and other black city employees. The district court concluded its consideration of this count by holding that a public official in Rice's position in 1983 could not reasonably believe that 42 U.S.C. § 1985(3) was only to protect blacks, not whites, from racial discrimination.

Rice argues that the qualified immunity he claims to be entitled to under count III applies to count IV, "[b]ecause it was not clearly established that [Rice's] acts violated the equal protection clause, *a fortiori* it was not clearly established that a conspiracy to commit those acts was illegal." Because we have found Rice not entitled to qualified immunity under count III we might also *a fortiori* find he was not entitled to it under count IV, but the considerations are not the same.

The district judge's view of section 1985(3) is not without foundation. A mere reading of section 1985(3), as adopted in 1871 following the Civil War, does not suggest that it does not mean what it plainly says on its face. Its language extends protections to "any person or class of persons" and to "citizens" without evident distinction, racial or otherwise. It does not mention black or white or reveal on its face that some are entitled and some are not to "equal protection of the laws, or of equal privileges and immunities under the laws." There is also some legislative history that can be selectively extracted which suggests a literal reading of the statutory language is what Congress intended. Representative Rainey, for instance, expressed the desire that the act be construed to protect the humblest citizens without regard to rank, creed, or

color. CONG. GLOBE, 42d Cong., 1st Sess. 395 (1871).[5] Representative Buckley expressed his view that the legislation was not to protect "colored only, but the whites also." *Id.* at 190. Senator Edmunds also gave the statute a very expansive view. *Id.* at 567. Recently, we considered the racial application of section 1985(3) and found that without doubt it covered conspiracies against whites, not just blacks. *Triad Assocs., Inc. v. Chicago Housing Auth.*, 892 F.2d 583, 591-93 (7th Cir. 1989). We need not review here *Triad*'s cogent discussion of the issue. A clear signal in the fourteenth amendment context, though not precedential in this statutory interpretation, came from *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Both section 1985(3) and the fourteenth amendment provide for "equal protection" of the laws. Justice Powell in *Bakke*, 438 U.S. at 289-90, wrote that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." After that well-publicized decision in 1978, it could be argued no reasonable chief of police could have an objectively reasonable belief that "equal protection" used in one place would mean less when used in another. Our decision in *Triad* should therefore not have come as a surprise. We noted, however, in *Triad*, that the Supreme Court has never held that the statutory language of section 1985(3) was to protect other than blacks. Even without *Triad*, it could be argued that no one could reasonably have believed that the wholesale racial demotions and promotions of public officers as alleged here could be countenanced under the Constitution and the laws of this country, absent an affirmative action effort. That *Triad* comes only in 1989 could possibly be explained that it is simply because only in recent years have blacks gained a rightful share of political power, which can give rise to abuses, whether by black or white. But things are not so simply to be resolved.

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[5] The *Congressional Globe* was the official record of the United States Congress from 1833-1873.

In July 1983, the critical year in the present case, the Supreme Court said, "it is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes, and those who championed their cause. . . ." *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 836 (1983). It was the "predominant purpose" of the statute, the Court continued "to combat the prevalent animus against Negroes and their supporters." *Id.* One scholar in 1987 summed up the section 1985(3) situation:

> Even after one hundred and sixteen years, four major Supreme Court opinions, colorful legislative history, and over five hundred lower court opinions, there is probably no other federal statute in such complete disarray, distortion, and confusion as that section of the Civil Rights Act of 1871 now codified at 42 U.S.C. § 1985(3).

McDonald, *Starting from Scratch: A Revisionist View of 42 U.S.C. § 1985(3) and Class-Based Animus*, 19 CONN. L. REV. 471, 471 (1987) (footnote omitted).

Although scholars, lawyers, and judges have not yet resolved all the problems with section 1985(3), including some not pertinent to this case, it is possible that a reasonable police chief could have. But in any event it cannot be said that the law was clearly established in 1983. Rice is entitled to qualified immunity on count IV, thus requiring reversal on that count.

## V.

Turning to Rice's final claim, we review the district court's partial denial of qualified immunity on plaintiffs' cause of action alleging in count V a "pattern of harassment and retaliatory treatment by defendant Rice" since the filing of this complaint. Specifically, plaintiffs allege that Rice engaged in conduct that consisted of retaliatory transfers and a failure to consider plaintiffs for promotions in violation of their first amendment right to freedom of speech that protects their right to file this suit.

The district court granted summary judgment on the basis of qualified immunity for all acts that occurred on or before June 11, 1984, the date this Court denied rehearing in *Altman v. Hurst*, 734 F.2d 1240 (7th Cir.), *cert. denied*, 469 U.S. 982 (1984). In *Altman*, a police sergeant was reassigned to a less-desirable post after the police chief suspected that the sergeant encouraged another officer to appeal her suspension from the force. After the sergeant filed his complaint, a campaign of harassment was instituted against him. We held that the filing of the sergeant's suit and subsequent retaliation by the police chief were not in violation of plaintiff's first amendment rights because the speech concerned only a private matter rather than issues of public concern. *Altman*, 734 F.2d at 1243-44.

The district court read *Altman* to clearly establish, however, that a lawsuit raising a matter of public concern, not merely a private matter as in *Altman*, was therefore speech protected by the first amendment and entitled to protection under section 1985(3). Further findings by the district court determined plaintiffs' suit inherently involved a matter of public concern because it involved the superintendent of police. Accordingly, the district court denied Rice qualified immunity for acts after June 11, 1984. Rice claims he is entitled to qualified immunity for acts alleged to have occurred after June 11, 1984, as well, because he alleges that in 1984-1985 it was not clearly established that the first amendment prohibited retaliation for filing a civil rights lawsuit.

There is no disagreement in this court that the demotions and promotions alleged are of "public interest," but there is disagreement over whether the filing of this suit qualifies under *Connick v. Myers*, 461 U.S. 138 (1983), as a matter of "public concern," not merely public interest, and is therefore entitled to first amendment protection. In *Connick* a staff employee, disgruntled about a proposed transfer, circulated to other employees within that office a questionnaire seeking their views on internal office affairs. The employee was promptly discharged for being

insubordinate and causing office disruption. The Court held there was no first amendment protection for the employee's questionnaire as it was no more than an employee grievance circulated internally and concerning only internal office policy. In *Connick*, the Court noted that the employee did not seek to bring to light any wrongdoing or breach of public trust, and even if the questionnaire had been publicly distributed it would convey no more than the fact that a single employee was upset. *Id.* at 148. First amendment protection was not extended because the employee's speech did not substantially involve matters of public concern. For the Court to have interfered in those circumstances would have been merely to involve itself in office management, which it declined to do. It was explained that because of the enormous variety of fact situations in which these issues might arise it was not feasible to attempt to lay down a general standard to be applied to all situations. *Id.* at 154 (quoting *Pickering v. Board of Educ.*, 391 U.S. 563 (1968)). In each situation the time, place, and manner of the affected speech would be relevant, the court said. *Id.* at 152.

In *Yatvin v. Madison Metropolitan School District*, 840 F.2d 412 (7th Cir. 1988), the plaintiff sought a position with the school district but was not chosen. She then filed sex discrimination charges, applied for another position with the school district, but again was not chosen. This second failure gave rise to her suit claiming retaliation in violation of her first amendment rights for having filed the sex discrimination charges. This court characterized it as "the run-of-the-mine single-plaintiff lawsuit" in which plaintiff sought only her own promotion. No relief was sought against pervasive or systemic misconduct by public officials. Relief was denied. *Id.* at 420. The present case is, however, no "run-of-the-mine single-plaintiff discrimination case," but one of potentially broad impact not only upon the multiple plaintiffs but also upon the public's welfare and safety. In this case the filing of this lawsuit in federal court cannot fairly be characterized as merely these plaintiffs speaking out only about a matter of personal interest. The fact that the plaintiffs also sought

damages for alleged wrongs is not enough to keep Rice's actions from being a matter of public concern. If that be the test, only one not aggrieved could raise a protected matter of public concern, and even the few would-be plaintiffs that could meet this test might find the courthouse door blocked by principles of standing. Even if the plaintiffs themselves viewed their problems as only a personal matter, the test of public concern is more objective. It does not depend entirely on the fact the plaintiffs filed a suit for damages and would benefit but also on the other factors discussed in *Connick*.

It would be difficult to find a matter of greater public concern in a large metropolitan area than police protection and public safety. When there is a wholesale change in the highest police echelons allegedly only on a racial basis and not on merit, whether black for white, or white for black, there cannot but be, and there should be genuine public concern. There was clearly public interest. The reorganization was front page news in the *Chicago Tribune* on December 3, 1983. It must also be a matter of public concern if a group of public employees is allegedly harassed and penalized by supervisors for seeking redress in our federal court system because of their public objection to the alleged racial basis of the reorganization. That would be intolerable even for claims later found to be without merit.

We do not know what the merit of plaintiffs' count V allegations may turn out to be, but that should be decided at trial and not foreclosed by the unjustified grant of qualified immunity to excuse the alleged wrong. Summary judgment for Rice was unwarranted on count V.

The judgment is affirmed on counts III and V. The parties shall bear their own costs. Circuit Rule 36 shall not apply.

BAUER, *Chief Judge*, dissenting. I join Judge Flaum's dissent and write only to suggest that the analysis in Judge Cudahy's dissent does not represent my view of the matter. The dimensions of the problem which my Brother Cudahy thinks may have escaped the attention of the majority and minority on the issue are ones I frankly prefer to miss. I do not believe that a recognition of a "white" or "black" party by a judicial decision is necessary, nor do I think that it is true.

I think it unfortunate that voting proceeds along racial lines all too frequently, but voting has frequently been based on ethnic appeals; I don't doubt that people have voted for Irish candidates, Italian candidates and German or Polish candidates just because of that national identity (or voted against such candidates for the same reason). But that has not prompted the courts or law to recognize an "Irish" party or "Polish" party and designate one or the other as the winner or loser and ascribe the party patronage policy to be based on the ethnic identity of the winner.

The candidates were all members of organized and recognized political parties; indeed, the successful candidates for mayor, black and white, were all members of exactly the same party.

CUDAHY, *Circuit Judge*, dissenting:

I join Judge Flaum's dissent on the race discrimination issue but I write separately both to comment further on affirmative action and to note other dimensions of the problem which were not raised by the parties but which seem clearly relevant.

This is certainly not an ordinary case of affirmative action. It is not, at least from all appearances, the frequently encountered case of a government (usually white-dominated) instituting measures that benefit minorities in order

to remedy past discrimination. But, even assuming that the case presents a real, if unusual, case of affirmative action, Chief Rice did nothing that was clearly unconstitutional given the case law of 1983. Indeed, the state of affirmative action law has been notoriously unclear and in flux throughout the evolution of the doctrine. In the early 1980s, affirmative action law was still really in its infancy. (The first full blown affirmative action case decided by the Supreme Court was the *Bakke* decision handed down in 1978.)

In 1980, for example, the Supreme Court held that the government could use appropriately tailored race-conscious measures to counter the effects of past discrimination. *Fullilove v. Klutznick*, 448 U.S. 448 (1980). And, as late as 1986, the Supreme Court held that public employers may *sometimes* embark upon a race-conscious scheme for remedying past employment discrimination. *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). Our own case law has been consistent with these Supreme Court dictates. *Cygnar v. City of Chicago*, 865 F.2d 827 (7th Cir. 1989) (citing to *Lehman v. Yellow Freight System, Inc.*, 651 F.2d 520 (7th Cir. 1981)). Hence, a reasonable governmental actor could have taken lawful race-conscious measures in 1983. At least, when viewed as affirmative action, what Chief Rice did was not clearly unconstitutional at the time he acted.

However, I would prefer to try to analyze this situation as something other than a case of affirmative action. Rice denied that he was engaging in affirmative action and the facts do not really fit that mold. This seems to me instead to be very much a political case cast in a racial mold. The 1983 election resulting in the election of Mayor Washington was fought to an extraordinary extent along racial lines, but it was an election nonetheless. Indeed, the political alignment was coterminous with race to a degree having few parallels in electoral history.

" 'Except for the accidents,' " in the words of an involved political consultant, "Washington got all of the black vote." Kleppner, *Chicago Divided: The Making of*

*a Black Mayor* 217 (1985). In fact, in the 1983 general election for mayor, Harold Washington received, according to some estimates, approximately 99% of the black vote and only 12 to 16% of the white vote, with the Hispanic vote split. *Id.* at 218 (Table 23); Levinsohn, *Harold Washington: A Political Biography* 270 (1983). In effect, the blacks won the 1983 election and the whites lost.

The 1983 election was not a traditional Chicago election.

> "It used to be that . . . many people would have chosen sides according to party, and the campaign would be over," [Patrick] Caddell [a political expert] observed shortly before election day. "This time, people also have chosen sides, but the controlling fulcrum here is race not party."

Kleppner, *Chicago Divided* at 236.

The Police Department itself apparently played a significant role in the 1983 mayoral election:

> In the eight days before the April 12th general election, the mayoral race was shaping into a photo finish. In an effort to push Epton [the Republican candidate] over the finish line ahead of Washington, Police Supt. Richard Brzeczek announced his resignation on Tuesday, April 5, exactly one week before the big day. Brzeczek, who had campaigned for [former Mayor] Byrne in the primary, once warned the citizens of Chicago that the streets would not be safe under a Washington administration. The faint of heart were being led to believe that Chicago would become a 20th century Wild West Dodge City under a Black mayor. White police officers, among whom Epton had a great deal of support, expressed regret and anger at Brzeczek's departure. Black officers considered his resignation as a step forward.

Travis, *"Harold": The People's Mayor* 194 (1989). It is in this context of a supercharged political contest waged along starkly racial lines that we must view the controver-

sy before us—not as some sort of sanitized exercise in racial balance.[1]

In this case, Rice, a member of the winning (black) party[2] reorganized his department according to the classic dictates of politics to place more members of the prevailing party in policymaking positions. Since these were upper-rank policy positions the reorganization would not be illegal presumably even under *Rutan v. Republican Party of Illinois*, 58 U.S.L.W. 4872 (1990). Indeed, the district court held Rice to be qualifiedly immune from suit on the claim that the white officers were demoted for "political reasons." The district court reasoned that, under the circumstances, it was "not a constitutional violation to make employment decisions based upon political affiliations when party affiliation is an appropriate requirement for effective performance of the public office involved." This ruling has not been appealed. If this is a political case for one purpose, I believe it should be regarded as

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[1] Racist pamphlets involving the police set the tone:

> Handbills were circulated depicting a police insignia that read "Chicongo Po-lease." On the insignia in the center were a pair of lips, a watermelon slice, a can of beer, and a slab of ribs; and the written commentary on the side deprecatingly linked these to black heritage and traditions. Another piece of racist propaganda, *displayed in some of the police stations in white areas*, posed a series of questions emphasizing the danger that with a black mayor, Chicago would become another Gary, Indiana. (emphasis supplied). "No matter what anyone tells you, this election has come down to *race*," it warned. Readers were urged to "make the difference" by voting for Epton and to "make copies" of the handbill "and get the word around."

Kleppner, *Chicago Divided* at 211-212.

[2] Perhaps one should not call the contending organizations "parties"; perhaps "electoral vehicles" would be a more felicitous term. One of these survives even today in a perhaps attenuated form as the "Harold Washington Party." But I think it is generally better that we recognize electoral reality and apply a doctrine that might fit than turn a blind eye to reality in search of convenient conclusions.

a political case for other purposes—including equal protection.

In addition, it should be noted that a violation of the equal protection guarantee requires an intent to discriminate against a particular group—in this case whites. *See Washington v. Davis*, 426 U.S. 229 (1976). There seems to me no such intent on the facts before us. The Supreme Court has held that an intent to discriminate must be a "motivating factor" of the challenged action. *Hunter v. Underwood*, 471 U.S. 222 (1985). The line that prefers blacks and discriminates against whites is so fine that it may be argued with some force that an "intent to discriminate" is not evident here. Rice evidently did not desire to hurt whites; he merely intended to recognize and reward those who had worked, or at least voted, for the victor (and who were "philosophically" compatible with Washington and Rice). Moreover, there is no evidence in the record of any specific "racial animus" involving a desire on Rice's part to demean whites as such. Because this is really a political case and because Rice, in order to benefit members of the "black" party, had—by definition—to take actions that adversely affected whites, I cannot find the requisite discriminatory intent here. In short, Rice acted, not *because* he wanted to hurt whites, but "in spite of" the fact that he was hurting whites. *See Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979).[3]

On the basis of this "political" equal protection analysis, which seems to me considerably more realistic than a conventional affirmative action one, Rice either would be arguably innocent of a civil rights infraction or would have qualified immunity since promotions among policymaking officials after a "black" party political victory did not constitute a clearly established constitutional violation in 1983.

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[3] *See also United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977) (where six justices indicated that it was significant that the legislature *had not intended to injure* white voters when it drew up reapportionment plans that benefited minorities).

FLAUM, *Circuit Judge*, with whom BAUER, *Chief Judge*, CUDAHY, and KANNE, *Circuit Judges*, join, dissenting. I respectfully dissent from the majority's decision because I believe it is contrary to the Supreme Court's statement that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). As the majority correctly notes, this Court is not divided on the law of qualified immunity, but rather on its application when the defendant government official's state of mind is at issue. Specifically, I differ on whether the court should consider the alleged underlying state of mind to determine if there is a clearly established right. The majority injects intent into this analysis, while I believe intent should not be considered in objectively defining the relevant body of law. *See Anderson v. Creighton*, 483 U.S. 635 (1987) (qualified immunity to be applied objectively); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (objective qualified immunity analysis proper for summary judgment); *Polenz v. Parrott*, 883 F.2d 551, 553-54 (7th Cir. 1989) ("Supreme Court eliminated the subjective good faith element from the qualified immunity analysis"); *Cleveland-Perdue v. Brutsche*, 881 F.2d 427 (7th Cir. 1989) (qualified immunity analysis entails a purely objective inquiry), *petition for cert. filed*, 58 U.S.L.W. 3491 (U.S. Jan. 24, 1990); *Wade v. Hegner*, 804 F.2d 67 (7th Cir. 1986) (intent not relevant to whether constitutional standards clearly established). For the reasons discussed below, I respectfully dissent as to Counts III, race discrimination, and V, retaliation. I concur with the majority's opinion on Count IV, conspiracy.

## I.

My first disagreement concerns the majority's denial of qualified immunity on Count III, the race discrimination claim. Although the majority correctly notes *Harlow's* directive that an objective analysis, one eliminating subjective intent, must be applied in determining whether the constitutional violation was clearly established, it overlooks

the ruling in its application of the law to this case. The *Harlow* Court stated that it "was instituting a new regime of 'reliance on the objective reasonableness of an official's conduct' . . . and that it was generally eliminating '[j]udicial inquiry into subjective motivation.' " *Halpern v. Kissinger*, 807 F.2d 180, 185 (D.C. Cir. 1986) (Scalia, J.) (quoting *Harlow*, 457 U.S. at 817). The Court later confirmed that *Harlow* "purged qualified immunity doctrine of its subjective components." *Halpern*, 807 F.2d at 185 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985)). I fail to see how the majority's application takes these concerns into account.

My approach differs from that of the majority because I believe the right should be defined without considering intent. As the Supreme Court held in *Anderson*, 483 U.S. at 641, inquiry into an official's subjective intent is not part of the *Harlow* qualified immunity analysis. The majority's characterization of the right at issue incorporates the plaintiffs bare allegations of malice and thus sacrifices the "the 'objective legal reasonableness' that is the touchstone of *Harlow*." *Anderson*, 483 U.S. at 639. The majority's approach transforms qualified immunity into a simple rule of pleading, something the Supreme Court has warned against. *Id.* at 639. The right at issue, however, must be defined "in relation to the specific facts confronting the public official when he acted," *Rakovich v. Wade*, 850 F.2d 1189, 1209 (7th Cir. 1988) (*en banc*) (quoting *Colaizzi v. Walker*, 812 F.2d 304, 308 (7th Cir. 1987)), not his underlying state of mind. Accordingly, "under *Harlow*, an objective immunity analysis at the summary judgment stage prior to discovery does not include an evaluation of intent." *Rakovich*, 850 F.2d at 1210.

To appropriately define the right in these terms, intent must be removed from the analysis. Therefore, I conclude the correct portrayal of the specific right alleged to have been violated involving race is whether a reasonable superintendent of police could have concluded that he could take race into consideration for a limited reorganization of the exempt ranks of the police department. This char-

acterization of the right is more objective than that of the majority, as is required by *Anderson*. Accordingly, the court must consider all the law that the objective facts of the case support to determine whether the right is clearly established. In this context, an objective approach does not preclude a consideration of the state of affirmative action law merely because Rice may have lacked the subjective intent to implement an affirmative action plan.

The majority, in an attempt to demonstrate why the court should not consider affirmative action law, brings Rice's subjective intent into the analysis. Neither *Harlow* nor this Court's decision in *Cygnar v. City of Chicago*, 865 F.2d 827 (7th Cir. 1989), supports the majority's approach. In *Cygnar*, this Court found that a City of Chicago department head charged with race discrimination for promoting blacks and demoting whites in a one-time reorganization was entitled to qualified immunity based on the state of affirmative action law, even though he denied using race as a factor in his decisions. In that decision, we found that the defendant's intent was not at issue, but rather the question was whether the law put him on notice that his actions violated clearly established constitutional rights. We concluded that only by defining the right at issue in an objective manner, through the elimination of intent, can such notice be achieved. The majority attempts to distinguish *Cygnar* on the ground that the district court in that case found the defendant was actually carrying out an affirmative action plan and cryptically testified to that effect, whereas in this case Rice strongly denies ever considering race. This distinction, however, is not as significant as one would be led to believe. In addition, any minimal factual distinction between the cases is irrelevant under the objective qualified immunity analysis established in *Harlow*. Under that approach, the government official's intent is not dispositive of the question of whether the law was clearly established at the time. *See Anderson*, 483 U.S. at 641 (Official's "subjective beliefs about [the action] are irrelevant").

By focusing the decision of this Court on whether Rice intended an affirmative action plan, the majority also is

omitting *Harlow's* announced purpose of early elimination of insubstantial claims at summary judgment. In *Rakovich v. Wade*, 850 F.2d 1189, 1210 (7th Cir. 1988) (*en banc*), we stated that "under *Harlow*, an objective immunity analysis at the summary judgment stage prior to discovery does not include an evaluation of intent. This is because evaluating intent would be a factual analysis, whereas the objective inquiry is a legal question." *Rakovich*, 850 F.2d at 1210. "An objective analysis is less fact bound than a subjective analysis, making summary judgment a practical and effective means of terminating unnecessary litigation." *Id.* at 1205. The majority's approach, however, thwarts this goal. It requires a court to consider intent, inevitably sending more, if not most, cases to trial. I, respectfully, disagree with this outcome. Rather, I believe a court should only look to the objective facts and determine whether the actions violate clearly established constitutional rights; if not, then qualified immunity should be granted. If Rice's actions in this case, therefore, can objectively reflect an affirmative action plan, then he should be entitled to qualified immunity. Intent should not be the controlling factor.

At the time in question, Rice's actions satisfied the requirements in *Lehman v. Yellow Freight System, Inc.*, 651 F.2d 520 (7th Cir. 1981), that "(1) some type of statistical disparity between the local labor force and the minority composition of the employer's work force and (2) a time limit on the plan" existed. *Cygnar*, 865 F.2d at 844 (citing *Lehman*). For these reasons, I would find that Rice's objective actions did not violate clearly established constitutional rights and would entitle him to a grant of qualified immunity at summary judgment.

## II.

I also disagree with the majority's denial of summary judgment for Rice on Count V, the retaliation claim. The threshold inquiry in such a case is to determine whether the matter is one of public, or private, concern. *See Altman v. Hurst*, 734 F.2d 1240 (7th Cir. 1984). I differ with the majority's view that this is a matter of public concern.

The Supreme Court established the test in *Connick v. Myers*, 461 U.S. 183 (1983) to determine when an issue involves a matter of public concern. The *Connick* test does not look to what may be conveyed by the employee's speech, but rather requires a court to examine the reasons the employee is speaking.[1] The Court held the speech involved, distribution of a questionnaire, was motivated solely by a private purpose. In such circumstances, the Court stated, "when a public employee speaks not as a citizen upon matters only of public concern, but instead as an employee upon matters of only personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency." *Connick*, 461 U.S. at 147.

The mere fact that this case concerns a superintendent of police does not make this a matter of public concern. "To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case." *Connick*, 461 U.S. at 149. Our decision in *Altman* recognized this principle when we determined that even though the case involved a chief of police, the allegations were still purely a matter of personal interest and not public concern.

In *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985), this Court established a list of questions to be considered in deciding this issue. These are: "was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?" *Linhart*, 771 F.2d at 1010. If the answers to these questions reveal that the dispute was purely a private matter, then the court should dismiss the claim.

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[1] Count V concerns whether the plaintiffs have stated a first amendment claim. It is appropriate to consider the plaintiffs' intent, not the government official's, to decide this question under *Connick*.

In *Yatvin v. Madison Metropolitan School Dist.*, 840 F.2d 412, 419-20 (7th Cir. 1988), we applied the *Linhart* questions and determined that the bringing of a lawsuit alleging retaliation for filing a sex discrimination complaint against a school district was not activity protected by the first amendment because the lawsuit was not a matter of public concern. The plaintiff in *Yatvin*, we determined, only "wanted to advance her career, not promote a cause." *Id.* at 419.

So, too, it is apparent in this case that the plaintiffs in filing their complaint were primarily challenging their demotions and transfers rather than trying to raise an issue of public concern. They sought to advance their careers and receive compensatory and punitive damages for the alleged wrongs. It was not their central intention to promote a cause of public concern. As was the case in *Yatvin*, the plaintiffs' action "does not seek relief against *pervasive or systematic misconduct by a public agency or public officials*, and, . . . is not part of an overall effort by the plaintiff[s] . . . to correct allegedly unlawful practices or bring them to public attention." *Yatvin*, 840 F.2d at 420 (emphasis added). Race discrimination is a matter of public concern, but the plaintiffs did not seek to debate race discrimination, they were solely interested in advancing their own private employment interests.

III.

For the above stated reasons, I would reverse the district court's denial of summary judgment on Counts III and V. I concur with the majority's opinion on Count IV.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

# APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 84 C 1224 Date: March 6, 1989
Name of Assigned Judge: JAMES F. HOLDERMAN
Case Title: Auriemma et al v City of Chicago, et al

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Plaintiffs' oral motion to dismiss Count 1, dismiss the Chicago Police Department as party defendant and dismiss the Estate of Harold Washington is granted. Defendants' motion for summary judgment is granted in part and denied in part.

* * * * *

(12) ☒ (For further detail see ☒ order on the reverse of the original minute order form.)

(Reserved for use by the Court)

ORDER

84 C 1224

Plaintiffs' request for injunctive relief is moot as to defendant Rice. On Count 2, defendant Rice's motion for quali-

fied immunity is granted. On Count 3, defendant Rice's motion for qualified immunity is denied. On Count 5, defendant Rice's motion for qualified immunity is granted up to and including June 11, 1984 when the Seventh Circuit denied rehearing in the *Altman* case. Defendant Rice's motion for qualified immunity on Count 5 is denied for the period of June 12, 1984 on when it was clearly established that retaliation for the filing of a civil lawsuit dealing with a matter of public concern was conduct protected by the First Amendment to the Constitution.

D. 3

[1] [1] IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| JOHN AURIEMMA, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | 84 C 1224 |
| | ) | |
| v. | ) | |
| | ) | Chicago, Illinois |
| CITY OF CHICAGO, et al., | ) | March 6, 1989 |
| | ) | 2:08 p.m. |
| Defendants. | ) | |

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE JAMES F. HOLDERMAN

APPEARANCES:

For the plaintiffs:

John L. Gubbins and Associates, Ltd.,
by: JOHN L. GUBBINS and
LINDA DEBRA FRIEDMAN
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For the defendants:

Earl L. Neal & Associates, by:
EARL L. NEAL and
D. RAINELL RAINS
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[1] Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

Judson H. Miner,
Corporation Counsel, by:
HENRY F. FIELD,
Special Assistant Corporation Counsel,
MATTHEW J. PIERS,
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* * * * *

[10] THE COURT: * * * Moving then to defendant Rice's motion for summary judgment on the basis of qualified immunity, I note at the outset, of course, that the complaint seeks damages and injunctive relief from former Police Superintendent Rice and, of course, qualified immunity doesn't provide any protection against injunctive relief, but Mr. Rice is no longer the Superintendent of Police, so he is without any authority to provide the plaintiffs with the injunctive relief that they seek.

What is the plaintiffs' position on that point? Doesn't that make the injunctive relief moot?

MR. GUBBINS: That would make it, as far as Superintendent Rice, not as far as the City, of course, but as far as Superintendent Rice.

THE COURT: All right, then, the request for injunctive relief as to defendant Fred Rice is moot.

Looking at Count 2, Count 2 of the Amended Complaint charges Fred Rice with demoting the plaintiffs because they supported candidates for mayor other than the person who was ultimately elected at that time, Harold Washington.

Paragraph 51 of the Second Amended Complaint states:

> "Plaintiffs' demotions from their positions [11] "within the upper ranks of the Chicago Police Department were ordered by defendants Washington and Rice to

punish them for their failure to support Washington in his campaign for mayor and to make room for appointments of Washington supporters in those positions."

I guess the real crux of the qualified immunity analysis and the crystallization of the issues in connection with that was set forth, I thought, most clearly in Wade v. Hegner from the Seventh Circuit in 1986, 408 F.2d 67, and I'm referring counsel to page 70 of that opinion and, really, it's a two-issue analysis, the first issue being does the alleged conduct set out a constitutional violation, and the second issue being were the constitutional standards established at the time; in other words, was the constitutional right that was asserted by the plaintiffs clearly established so as to alert the public official that the right is clearly established and therefore a violation of that right would subject the public official to damages.

The Seventh Circuit en banc in Rakovich v. Wade, 850 F.2d 1180, at 1209, enunciated the test as follows. The test really is, "whether the law is clear in relation to the specific facts confronting the public official when he acted."

I realize there were some dissents and some concurring opinions in connection with the enunciation of [12] that issue, dissenting from Judge Wood's opinion in the Rakovich case, but under this analysis, I believe on Count 2 there are two reasons why Fred Rice is entitled to qualified immunity.

The first is that I conclude, without deciding the issue of whether or not Fred Rice's conduct in transferring and demoting the plaintiffs amounts to a constitutional violation, and on this issue, the recent Seventh Circuit case in Rutan v. Republican Party, which was handed down on February 16th of 1989—that case strongly suggests, I believe, that the conduct alleged here does not consti-

tute a constitutional violation, but separate and apart from that, the constitutional standards were certainly not clear and established in December of 1983 at the time that Mr. Rice took the action that he took.

By 1983 it had been decided—and I'm referring to Delong v. United States, 621 F.2d 619, Fourth Circuit, 1980—that case had been decided, limiting the Branti and Elrod protection to employment decisions resulting in dismissals or in "constructive discharge."

Now, I realize that it's the plaintiffs' argument that removal from their exempt positions, from the plaintiffs' exempt positions, without cause or a hearing is substantially equivalent to dismissal. Plaintiffs set forth that argument in their response brief on page 9. But I believe [13] that this argument does not preclude summary judgment in favor of Fred Rice on the qualified immunity basis.

It was not clear in 1983 what constituted a constructive discharge, and when the Seventh Circuit even in the Rutan case just a few weeks ago was attempting to articulate what degree of coerciveness and disruptiveness and loss of financial resources is necessary to a finding that a transfer or demotion amount to a constructive discharge, the Seventh Circuit still was attempting to decide that particular question.

The plaintiffs have not provided sufficient evidence that their return to their career ranks imposed such a burden upon them as employees of the City of Chicago that it would have led a reasonable employee in their positions to quit. That's the test that was enunciated in the Rutan case regarding constructive discharge.

In short, I believe that the state of the law is as yet undecided as to what liability, if any, is incurred by a government official who takes adverse employment action that involves loss of rank and pay but falls short of dis-

missal or constructive discharge, because it's the constructive discharge and the dismissal that are indicated that there's a—that the action taken by the public official is constitutionally prohibited. And at least this issue remained undecided in 1983.

[14] Therefore, Fred Rice's actions as far as Count 2 is concerned I believe did not violate a clearly established constitutional right. Consequently, Mr. Rice is entitled to qualified immunity on Count 2.

The other reason why I believe that Mr. Rice is entitled to qualified immunity on Count 2 is that under the Branti analysis, it's not a constitutional violation to make employment decisions based upon political affiliations when party affiliation is an appropriate requirement for effective performance of the public office involved.

It wasn't clearly established in 1983 that the plaintiffs did not fall within the parameters of the term "confidential employee"—and I put "confidential employee" in quotes. Basically, I'm following what the Seventh Circuit determined with regard to 1984 in the Cygnar case as to the OMI employees.

Just being nonexempt from the Shakman decree did not put Rice on notice that political affiliation wasn't a proper criterion. And I certainly don't believe in 1983 that Mr. Rice was on notice, because even the District Court here in the Herron case, Herron v. City of Chicago, at 591 Fed. Supp. 1565, decided in 1984, had not made it clear that employment actions beyond discharge were covered by that consent decree.

Consequently, I think at that time a public [15] official in the position of Mr. Rice was free to permissibly evaluate the positions that the plaintiffs were removed from as confidential, and I believe that that's a further basis for why Mr. Rice should be accorded qualified immunity under Count 2. These plaintiffs were within the top 100

employees of the Police Force. And I'm not sure that even now we could find that they were not confidential employees within the meaning of that term as it has been interpreted, and it certainly wasn't clear in 1983.

So, consequently, as to Count 2, Mr. Rice is accorded qualified immunity.

Moving on to Count 3 as to Mr. Rice, the Second Amended Complaint states that race was a substantial and motivating factor in Mr. Rice's decision to demote the plaintiffs.

* * * * *

[37] * * * THE COURT: All right, looking specifically at the allegations of the complaint, and I have to consider all of the allegations of the complaint, which does not articulate anything with regard to disparity among the exempt ranks as to the racial makeup of those exempt ranks, I must look to the constitutional right that is specifically being alleged to have been violated and look to the reasonableness of the action, [38] as to whether a reasonable public official would have known, based upon the law as established at that time, whether the action taken as alleged in the complaint violated a clearly established constitutional right.

Taking into account the allegations of the complaint as they are set forth in the complaint, and taking into account the constitutional right as articulated by the plaintiffs, I believe that it was clearly established that a public official could not use race for making employment determinations in the positions that then Superintendent Rice made, and so, consequently, as to Count 3, qualified immunity at this stage will be denied, and, of course, the case law has indicated that this determination should be made in advance of trial based upon objective criteria so, consequently, applying those objective criteria, I believe it was clearly established, and I believe that the right

was specifically established at that time that employment decisions could not be made on the basis of race. Consequently qualified immunity as to Count 3—the motion for summary judgment on the basis of qualified immunity will be denied as to Fred Rice.

* * * * *

[51] * * * THE COURT: * * * As it stands right now, and as indicated by plaintiffs' counsel, there are now four plaintiffs [52] who allege retaliatory harassment under count 5 of the complaint, and the issue as to Mr. Rice's qualified immunity with regard to the retaliatory harassment claim, the plaintiffs claim there was a pattern of retaliatory transfers and failure to consider plaintiffs for promotion.

Once again I have to make the analysis under qualified immunity, was there a clearly established constitutional right that is alleged to have been violated by the plaintiffs.

In reviewing the case law in connection with this issue, and applying the case law and dealing specifically with the specific fact situation, and the articulation of the established right, the decision that most closely follows or mirrors the allegations is the decision of the Seventh Circuit in Altman v. Hurst at 734 F.2d 1240, which the Seventh Circuit decided on May 18th of 1984, and denied rehearing on June 11th of 1984. Of course, the complaint was filed in February of 1984.

The plaintiffs allege that this was a continuing activity on the part of the defendants. I could not find a case clearly articulating that the filing of a lawsuit was an action protected by the First Amendment and, in fact, I think the case law is that the mere filing of an action is not protected by the First Amendment. You must look to the subject matter of the lawsuit in determining whether

it's a [53] matter of public concern or a matter of private concern.

Of course, the Altman case, the decision in the Seventh Circuit, was that in that case, which was filed by a police officer, and the allegation was retaliation for encouraging the filing of a lawsuit, that the matter was of private concern, and so, consequently, did not allow for First Amendment constitutional protection.

Looking at the subject matter of this lawsuit, which is an allegation that the Superintendent of Police impermissibly used race as a criterion in making promotions and demotions in December of 1983, I believe does raise a matter of public concern. I think any public official at the time, in December of 1983, would believe that an allegation of race discrimination would be a matter of public concern if that allegation of race discrimination is targeted at the Superintendent of Police of the City of Chicago.

Consequently, although the Seventh Circuit in the Altman case affirmed the district court decision to dismiss based upon the fact that the matter was a private concern in that case, I must make a case-by-case factual analysis from the standpoint of whether the right as articulated was clearly established.

I believe certainly by the time that the Seventh Circuit, on June 11, 1984, made its determination to deny rehearing in the Altman case, thus presenting the Altman [54] case as a case which established the law of this Circuit, I believe at that point it was clearly established that a lawsuit raising a matter of public concern was speech protected by the First Amendment, and that retaliation for that conduct would violate First Amendment constitutional rights.

So, consequently, applying that, I'm going to accord former Superintendent Rice qualified immunity up to and including the date of June 11, 1984, but deny qualified immunity after that date in connection with the issues and the actions he took with regard to Count 5, and so that will be the operative date with regard to the evidence as to Count 5, anything after June 11, 1984.

* * * * *

# APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 84 C 1224 Date: March 7, 1989

Name of Assigned Judge: JAMES F. HOLDERMAN

Case Title: Auriemma et al v City of Chicago, et al

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Defendant Rice's motion for reconsideration of the denial of qualified immunity as to him on Count 3 is denied. Defendant Rice's motion for summary judgment for qualified immunity as to Count 4 is denied per remarks made in open court.

* * * * *

E. 2

[1] [1] IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| JOHN AURIEMMA, DANIEL COLL, MARSHALL CONSIDINE, RENALDO COZZI, KENNETH CURIN, RUSSELL DITUSA, THOMAS FARRAGOI, LAWRENCE FORBERG, JOHN HINCHY, KATHRYN KAJARI, GEORGE MARCIN, PATRICK MCDONOUGH, WALTER MURPHY, DOMINIC RIZZI, JAMES STAMPNICK, THOMAS WALTON, and ROGER WHALEN, | ) | Docket No. 84 C 1224 |
| Plaintiffs, | ) | Chicago, Illinois March 7, 1989 10:30 o'clock a.m. |
| -VS- | ) | |
| CITY OF CHICAGO, HAROLD WASHINGTON, CHICAGO POLICE DEPARTMENT, and FRED RICE, | ) | |
| Defendants. | ) | |

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE JAMES F. HOLDERMAN

[1] Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

APPEARANCES:

For the Plaintiffs:

John L. Gubbins and Associates, Ltd.
by: JOHN L. GUBBINS and
LINDA FRIEDMAN

For the Defendants:

Law Offices of Earl Langdon Neal
by: EARL LANGDON NEAL and
D. RAINELL RAINS

Dr. Henry F. Field

Deputy Corporation Counsel
by: MR. MATTHEW J. PIERS

Assistant Corporation Counsel
by: MR. PHILLIP SNELLING

* * * * *

[24] * * * THE COURT: I believe that the analysis should be fact specific in determining whether the plaintiffs have alleged a clearly established constitutional violation. And based upon this record and the undisputed facts construing the facts in the light most favorable to the nonmoving party, as I must on a motion for summary judgment, I believe that the plaintiffs have made out a clearly established constitutional violation which was clearly established in December of 1983. And so consequently, the motion of the defendants for reconsideration, the issue of qualified immunity as to Fred Rice on Count III, is denied.

* * * * *

[34] [1]

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| JOHN AURIEMMA, DANIEL COLL, MARSHALL CONSIDINE, RENALDO COZZI, KENNETH CURIN, RUSSELL DITUSA, THOMAS FARRAGOI, LAWRENCE FORBERG, JOHN HINCHY, KATHRYN KAJARI, GEORGE MARCIN, PATRICK MCDONOUGH, WALTER MURPHY, DOMINIC RIZZI, JAMES STAMPNICK, THOMAS WALTON, and ROGER WHALEN, | ) | Docket No. 84 C 1224 |
| Plaintiffs, | ) | Chicago, Illinois March 7, 1989 2:00 o'clock p.m. |
| -VS- | ) | |
| CITY OF CHICAGO, HAROLD WASHINGTON, CHICAGO POLICE DEPARTMENT, and FRED RICE, | ) | |
| Defendants. | ) | |

TRANSCRIPT OF PROCEEDINGS
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D. RAINELL RAINS

Dr. Henry F. Field

Deputy Corporation Counsel
by: MR. MATTHEW J. PIERS

Assistant Corporation Counsel
by: MR. PHILLIP SNELLING

* * * * *

[35] * * * THE COURT: Good afternoon again.

All right, with regard to the issue that was pending, we were addressing, at the time that we broke, which is Count IV, the Section 1985(3), claim of conspiracy, just to make sure the record is clear, it is my ruling that as to the political discrimination claim, which is specifically set out as a substantive constitutional violation under Count II, that Mr. Rice had qualified immunity or should be accorded qualified immunity. And so, consequently, that qualified immunity for that constitutional violation extends onto the conspiracy claim under Section 1985(3). And so really the conspiracy charge that can be presented to the jury can only be based upon allegations of racial discrimination. I assume that everyone understood that before.

MR. GUBBINS: That's correct.

THE COURT: Do you understand, Mr. Gubbins?

MR. GUBBINS: I believe so, your Honor, yes.

THE COURT: All right. The opinion in Grimes versus Smith, which was cited by defense counsel this morning, [36] Judge Eschbach's opinion, dealing with the Supreme Court authority in Griffin and Scott stated not only in the sections specifically referred to by Mr. Neal this morning, but stated on page 1365 of that opinion, of course, that's at 776 F 2d 1359, the particular page I'm referring to now is 1365, the first full paragraph, about half-way down that paragraph, Judge Eschbach wrote, "In Griffin it was made clear that racially motivated conspiracies were prohibited under Section 1985(3)."

That seemed to me to be a statement of Judge Eschbach's opinion as to the clarity of Griffin.

The language on the following page, to which defense counsel has referred, states as follows: "The import of both Griffin and Scott is that the legislative history of Section 1985(3) does not support extending the statute to include conspiracies other than those motivated by a racial, class biased animus against 'Negroes and their supporters.' "

Judge Eschbach in that opinion, following the language I have just quoted, which is on page 1366, in the right-hand column, went on to state, and I believe this is the holding of the Court in that case, "Thus, we join the conclusion of the 4th Circuit in Harrison that Section 1985(3) does not reach nonracial political conspiracies."

Judge Eschbach in the Grimes versus Smith case had a footnote to that holding, Footnote 12, the last paragraph [37] of which states, "Our holding today does not, of course, disturb our prior decisions in which we held that both conspiracies animated by both racial and political motives were within the scope of Section 1985(3)." And

cited as an example, the Quinones case, which plaintiffs' counsel referred to this morning.

It seems to me that the comment made by Judge Eschbach as to the history behind the Griffin and Scott decisions dealt with the concept of conspiracies which had as their object racial animus. It seeks to me today, in looking at the decision by Judge Eschbach in Grimes versus Smith, that Judge Eschbach was not stating that only racial discrimination against blacks was the violation that could be presented by an allegation under Section 1985(3).

I think in order to, for a public official in the position of Superintendent Rice, in December of 1983, when he took the action that he took, for a public official to believe, a reasonable public official in the position of Mr. Rice, in 1983, to believe that only racial discrimination against blacks was covered by Section 1985(3) would be an unreasonable position. I believe the thrust of Section 1985 was to cause all racial discrimination which was effectuated through conspiratorial conduct to be a violation.

I believe that the language that was presented and the language which I have referred to, which states, "to [38] include conspiracies other than those motivated by racial, class biased animus against 'Negroes and their supporters,' " to be dicta within that decision in explaining the history behind the Griffin and Scott cases and the holdings in those cases.

So consequently, I'm going to deny the application of qualified immunity as to Mr. Rice with regard to the Section 1985(3) claim, because I believe that the law was clear in 1983 that all racial discrimination as opposed to any other type of discrimination, such as, political, economic, or other, was clearly covered by Section 1985(3), and I believe that that was clear in the year 1983. And so consequently, the motion for summary judgment as to Count IV under qualified immunity as to Mr. Rice will be denied.

* * * * *

Supreme Court, U.S.
FILED
DEC 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-616

In The

# Supreme Court of the United States

October Term, 1990

FRED RICE,

*Petitioner,*

*vs.*

JOHN AURIEMMA, *et al.*,

*Respondents.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit*

## BRIEF IN OPPOSITION FOR RESPONDENTS

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## QUESTIONS PRESENTED

1. Whether public officials already fully immunized by the Seventh Circuit for damage claims arising from decisions expressly acknowledged as efforts to engage in affirmative action need have the protections of official immunity further extended on the same rationale even to those personnel decisions which they deny were made for race-conscious and affirmative action reasons.

2. Whether dictum confirming prior consistent case law can clearly establish law for qualified immunity purposes.

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No. 90-616

In The

# Supreme Court of the United States

October Term, 1990

FRED RICE,

*Petitioner,*

*vs.*

JOHN AURIEMMA, *et al.*,

*Respondents.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit*

## BRIEF IN OPPOSITION FOR RESPONDENTS

Respondent John Auriemma and his sixteen co-plaintiffs respectfully request this Court to deny petitioner Rice's petition for writ of certiorari and expeditiously rule allowing this action to return to the district court for trial.

## OPINIONS BELOW

The respondents have included two additional opinions and an order entering a jury verdict. The two opinions are from the district court. The magistrate's report and recommendation of September 20, 1985 to Judge Holderman is reprinted in full in Appendix C. The decision of Judge Holderman denying defendants' first motion for summary judgment in most respects is reprinted in Appendix D.

The minute order reprinted in Appendix B is the order entering the jury verdict in part against petitioner Rice on the race discrimination claims of plaintiffs O'Sullivan and Luchtenburg in the related case of *Maloney, et al. v. Rice, et al.*, Nos. 84 C 689 and 85 C 1905.

## STATEMENT OF JURISDICTION

The order of the district court denying qualified immunity to petitioner Rice, a public official is appealable here pursuant to *Mitchell v. Forsyth,* 472 U.S. 511 (1985).

## STATEMENT OF THE CASE

The misleading information and misrepresentations put forward by Rice in his petition provide little guidance to this Court regarding the course of the proceedings below. After committing himself to certain defenses early in the career of this eight-year old action, Rice recently needed to cast about for new defenses because the old ones failed him. To do so he has now contradicted himself and risked perjury before federal juries and judges. The immunity rulings of Judge Holderman as affirmed by the Seventh Circuit are based in a thorough knowledge of the intricacies of the facts disclosed by extensive discovery and the numerous motions Rice has filed supporting his defenses. Because of his

familiarity with the record, the district court had no doubt that Rice's new affirmative defense of affirmative actions was at odds with his previous deposition and trial testimony and in fact could not be supported by the record.

Following his appointment as Superintendent of the Chicago Police Department, petitioner Rice embarked on a course of demoting numerous whites from the top supervisory ranks of the Department. At least six actions were filed in the Northern District of Illinois arising from Rice's mass demotions. Except for one hispanic demotee, all the demotees were white and substantially all the whites were white males. No black was ever demoted. Numerous blacks were promoted. The six actions became grouped into two parts. These were the *Auriemma* case and the *Maloney* case. The two groups were consolidated for discovery purposes. Thousands of documents were produced and over seventy depositions were taken.

Initially and in fact for the first three years of litigation petitioner Rice's defenses were straightforward. He denied that he was ever motivated by race or ever acted out of any race consciousness (R52). He also argued that he had absolute discretion to assign Chicago Police Department personnel as he saw fit without regard to any prohibitions found in the First Amendment nor in the Equal Protection Clause of the Fourteenth Amendment (R12). Twice the district court ruled that Rice's personnel actions were subject to First Amendment and Fourteenth Amendment considerations. The first decision is reported at *Auriemma, et al. v. City of Chicago, et al.*, 601 F. Supp. 1080 (N.D. Ill. 1984). The second decision is found in Appendix D. Rice's absolute discretion defense has only been briefly raised since Judge Holderman's 1987 ruling.

From the first, Rice categorically denied he was conscious of the race of the plaintiff officers at the time he demoted them.

Race, according to Rice, was never a factor in his personnel decisions affecting plaintiffs and the other whites demoted (App. A, 1a). Rice never raised affirmative action as an affirmative defense in his answer (R52). He never pled, stated during discovery nor raised by motion any suggestion of affirmative action (R52, 57, 88). Rice's defense posture changed with two events. The first was a jury verdict finding him liable in August 1988 for race discrimination against two white officers he demoted, O'Sullivan and Luchtenburg (App. B, 4a). The second was the issuance of the Seventh Circuit's opinion in *Cygnar, et al. v. City of Chicago, et al.*, 865 F.2d 827 (7th Cir. 1989).

The jury verdict came in the trial of the *Maloney* litigation. The *Maloney* litigation was tried twice. The first trial ended on March 2, 1988 in a mistrial when Rice tried to change his defense and even admitted he had lied in other federal proceedings. The second trial ended in a verdict on August 8, 1988. The jury found Rice had discriminated against two of the four white plaintiffs when he demoted them because they were members of the white race (App. B, 4a). The second event was the issuance of the *Cygnar* opinion. In *Cygnar*, the Seventh Circuit accorded immunity to a Chicago official, Raleigh Mathis, who had made sweeping changes in the City's Office of Municipal Investigations. Mathis admitted at his trial that he was race conscious when he made mass reassignments of white male officers. He expressly raised at the time of the reassignments the lack of affirmative action concepts and the statistical disparity between whites and minorities in the office. *Cygnar* at 842-44. No such information was ever collected or reviewed by Rice at the time he demoted respondents.

Thus in early 1989 just prior to the trial date set for the *Auriemma* case, Rice shifted his defense and raised for the first time by summary judgment official immunity and affirmative action (R109). To lend credibility to the immunity defense,

petitioner Rice presented sketchy statistical information recently collected concerning the racial makeup of the Chicago Police Department (R105). The statistical racial data, however, was not assembled nor reviewed by Rice at the time he made the demotions but over five years later (R105). There is no reference in the statistics to the relevant labor pool.

One of the misrepresentations proffered by petitioner Rice in his Statement of the Case relates to his attempt to minimize the evidence found by Judge Holderman to support respondents' claims. On the chart Rice used to record his personnel changes he wrote "white" in front of a bracket enclosing a number of white male supervisors (R122, 69, 70). Judge Holderman stated in his order that the word "white" appeared "beside the names of certain police officers" as the exhibit plainly shows (App. D, 60a). Petitioner Rice represents that the word "white" appears in front of one officer's name. Any reliance on petitioner Rice's factual representations should be guarded.

The Seventh Circuit properly affirmed *en banc* the district court's denial of immunity to Rice.

## REASONS FOR DENYING THE WRIT

### I.

### WHEN PUBLIC OFFICIALS ACKNOWLEDGE THEIR RACE-CONSCIOUS PERSONNEL DECISIONS ARE EFFORTS TO ENGAGE IN AFFIRMATIVE ACTION, THE SEVENTH CIRCUIT HAS UNHESITATINGLY IMMUNIZED THEM FROM DAMAGE CLAIMS, BUT IT HAS CORRECTLY REFUSED TO FURTHER EXTEND IMMUNITY TO THOSE OFFICIALS WHO DENY THAT THEIR PERSONNEL DECISIONS WERE MOTIVATED BY RACE AND FOR AFFIRMATIVE ACTION REASONS.

#### A. The Seventh Circuit Fully Immunizes Public Officials From Damage Claims When They Fully Acknowledge Their Race-Conscious Personnel Decisions Are Efforts To Engage In Affirmative Action.

No public official can doubt the Seventh Circuit's strong policy to immunize him or her when forthrightly engaged in affirmative action. In *Cygnar*, the Seventh Circuit thoroughly addressed the immunity issue. After discussing the key opinions from this Court, the Seventh Circuit concluded that governing affirmative actions law was not so clearly established as to prevent a public official from transferring employees based on their race "to correct what he perceived to be statistical underrepresentation of minorities" in the work place. *Cygnar* at 844.

The analysis in *Cygnar* is the same as employed by the Seventh Circuit in its *en banc* opinion on review here. The difference is that Mathis, the public official in *Cygnar*, acknowledged he was race conscious when he ordered his reassignments, whereas Rice denies it. It is simple logic that a public official can not propose to engage in affirmative action without first noting which among

his subordinates belong to different racial groups. It is a precondition to assembling racial statistics. Mathis admitted he did so. Rice denied any race consciousness and reviewed no racial statistics. The Seventh Circuit correctly refused to extend the rationale for granting immunity to Mathis any further to protect Rice.

The intent of public officials where immunity is the issue is not the murky concept Rice contends. In fact how a public officials' intent should be dealt with is adequately explained by the Seventh Circuit. Rice argued below that all intent must be extracted out of any qualified immunity analysis. In its opinion in *Rakovich v. Wade,* 850 F.2d 1180 (7th Cir. 1988) (*en banc*), the Seventh Circuit took full account of this Court's opinions in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982) and *Anderson v. Creighton,* 483 U.S. 635 (1987). *Rakovich* decided after *Anderson,* specifically discusses how the objective standard of *Harlow* is to be employed in a case such as this where the plaintiff's claim depends on the state of mind of the defendant official. *Rakovich* does not hold as petitioner Rice argues that intent is irrelevant. Rather *Rakovich* cautions that it is a mistake to read *Harlow* too broadly. As the *Rakovich* court explained:

> The elimination of intent from the formula does not mean that the *Harlow* Court sought to limit civil rights actions to those where state of mind was *not* a part of the substantive law. *See* Note, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose of Civil Rights Litigation,* 95 Yale L.J. 126 (1985). *Harlow* merely states that intent must not be *evaluated or weighed* through a factual inquiry, which would reduce the likelihood that qualified immunity could be decided in a motion for summary judgment. *See Harlow,* 457 U.S. 818, 102 S.Ct. at 2738.

*Id.* at 1209-10. The Court then followed its time-honored and judicious approach to analyzing Rice's intent:

> Under *Harlow* the district court must conduct a two-part analysis: (1) does the alleged conduct set out a constitutional violation? and (2) were the constitutional standards clearly established as the time in question? . . . Intent is relevant to (1) but not to (2). *Wade v. Hegner,* 804 F.2d 67, 70 (7th Cir. 1986). Thus, under part (1) of this approach "plaintiffs' supported allegations are assumed true, including intent." *Id.* at 69 & n. 3 (emphasis added).

850 F.2d at 1210.

Respondents allege that Rice intended to discriminate against them for being white when making his demotions. Because Rice raises no defense that he intended to racial balance or accomplish affirmative action there is nothing more to add to the analysis. The only question left is whether the constitutional standards were clearly established in 1983. Because there can be no serious dispute that racially motivated demotions of whites absent an affirmative action defense was unlawful in 1983, Rice is not entitled to qualified immunity.

The Seventh Circuit's analysis announced in *Rakovich* and followed in *Cygnar* is fully consistent with *Harlow* and *Anderson*. Furthermore the Seventh Circuit's decision in *Cygnar* does not conflict with other Circuit's review of any affirmative action defense proffered by public officials. Such a review has been rare, for petitioner Rice can not provide the citation to another case analyzing a public official's immunity arising from an affirmative action defense.

**B. The Seventh Circuit's Refusal To Extend Immunity To Public Officials Who Refuse To Adopt An Affirmative Action Defense Or Who Refuse To Even Acknowledge Their Personnel Decisions Were Race-Conscious Is Not At Odds With Any Reported Decision.**

Petitioner Rice tries to draw this Court into an academic discussion. Rice contends that he is entitled to immunity on an affirmative action defense which he is precluded from pursuing because of his admissions. There is no question that on the facts as presently developed through extensive discovery, Rice cannot support at trial an affirmative action defense.

This Court has never extended immunity to an official for a defense from which by his own admission he is factually precluded. Petitioner Rice provides no lower court authority for such a dishonest result. To extend this eight-year litigation further to indulge Rice's clear invitation to engage in speculation of what potential defenses Rice might have had but for the real facts of his case little serves the development of official immunity law and will work great hardship on the respondents.

As this Court recognized in *Anderson* the factual context in which the immunity defense arises has a bearing on the availability of the defense. *Id.* at 3040-41. *See also, Rakovich v. Wade, supra,* at 1208. The district court must assess the availability of the defense in light of the pleadings and disclosed facts. Judge Holderman properly assessed Rice's new defense based on affirmative action as an effort to assert not only a new defense just prior to trial but also to raise a defense which Rice could not support by testimony having previously denied race was a factor in the respondents' demotions (App. A, 1a).

Rice responded "certainly not" when asked if he took any personnel action against any person in his 32-year career because

of that person's race (R122, Ex. C7). He explained: "If I bring any other factors besides efficiency and effectiveness into that top command structure of the Chicago Police Department, I would be doomed to failure as a superintendent" (*id.*) He denies that the personnel decisions at issue here were motivated by plaintiff's race (R122 at 12).

The district court had further good reasons in the factual context to deny Rice's immunity motions. By stipulation and agreement Rice bound himself not to file any further summary judgment motions after August of 1987 (R88). He broke this court order as memorialized in the court's final pretrial order (R88, 89).

Also, the district court committed four weeks' trial time to this case. The judge specifically selected the date of March 6, 1989 so that a jury could be picked from a new pool of prospective jurors instead of from holdovers. All other civil cases on his docket were denied the right to trial during these four weeks. Moreover, three plaintiffs traveled from out-of-state for the trial and all seventeen were present in court, prepared for trial. Further, plaintiffs' counsel set aside four weeks in their schedules to try the case and had been preparing the clients and witnesses since at least the first of the year. This Court, other district court judges and clients of plaintiffs' counsel made concessions to accommodate the upcoming trial.

## II.

## THE SEVENTH CIRCUIT CORRECTLY RELIED ON DICTUM WHERE IT CONFIRMED PRIOR CONSISTENT CASE AUTHORITIES THEREBY ESTABLISHING CLEAR LAW FOR QUALIFIED IMMUNITY PURPOSES.

Respondent Rice argues that he should be entitled to qualified immunity on the retaliation claims because a reasonable official would not have known in 1983 that retaliating against a person for filing a federal lawsuit violated clearly established law.

The district court and the Seventh Circuit correctly recognized that *Altman v. Hurst,* 734 F.2d 1240 (7th Cir. 1984) established that the subject matter of a suit dictates the entitlement to First Amendment protection from retaliation. It is undisputed that on December 2, 1983, the demotions were covered on television and Superintendent Rice prepared a press release. Further, as Judge Holderman reasoned, an allegation that the Superintendent of Police used race as a criteria in making promotions and demotions in the upper ranks of the Police Department raises a matter of public concern (R53). For these reasons, the court found that Rice could reasonably have been expected to know that on June 11, 1984, that retaliation was unconstitutional.

There is, however, an even stronger reason for finding petitioner Rice's argument on this point frivolous. The case entitled, *Alliance to End Repression v. City of Chicago,* 561 F. Supp. 537, at 562-3 (N.D. Ill. 1982) "clearly and expressly" prohibits retaliation against persons for exercising their First Amendment rights. The City which is the subject of the decree concedes that the federal consent decree forbids disruption, interference or harassment of any person because of conduct protected by the First Amendment. In light of this consent decree, Rice's argument on the retaliation count is frivolous.

Finally a federal magistrate has already determined that Rice retaliated against Marshall Considine, former head of the Chicago Police Department's Crime Laboratory. Her recommendations made after an extensive hearing are appended. (App. C, 6a). In the course of making findings and conclusions, the magistrate clearly concluded that Rice's actions against Considine implicated First Amendment protections (App. C, 53a). Rice's attorney did not then raise a defense of official immunity. It was almost three years later before they raised the defense. The injunction proceeding initiated by Considine was later mooted by his retirement.

## CONCLUSION

This Court should, for the foregoing reasons deny Rice's petition for certiorari and allow this case to proceed expeditiously to trial.

Respectfully submitted,

JOHN L. GUBBINS
*Attorney for Respondents*

**APPENDIX A — TRIAL TRANSCRIPT, *MALONEY v. RICE*, NO. 85C 1905 (JULY 25, 1988-AUGUST 8, 1988)**

[Commencing at p. 1249]

Q. Who was the Mayor who appointed you? A. Well, the prior Mayor was Jane Byrne.

Q. And that is the mayor who appointed the members who then nominated you? A. That's correct.

Q. All right. Superintendent, as I understand your testimony, you have been a lieutenant since 1968 and a member of the Chicago Police Department exempt ranks since 1970, is that correct? A. That's correct.

Q. Superintendent, in all that time, have you had occasion to make many, many personnel decisions? A. That's correct.

Q. Have you ever made any of those decisions with regard to anyone of your men based on their race or based on their politics? A. No.

Q. And let me ask you specifically, with regard to —

MR. THEOBALD: Judge, I just have a general objection to all this as beyond the scope.

If you want to do it now rather than later, that's okay. I don't know how far we are going.

*Appendix A*

THE COURT: I don't either, but those answers may stand.

MR. PIERS: Very well.

* * *

[Commencing at 1433]

He was one of my deputy chiefs in patrol, and I was favorably impressed with his dedication and loyalty to the Chicago Police Department in my working with him in prior capacities.

I've always been deeply impressed with his professionalism, his love for law enforcement, his zest for law enforcement, his ability to comminicate.

Q. Now, there has been some testimony in this case that — strike that, please.

Did politics play any role in your selection of Captain Jemillo for that job? A. Certainly not.

Q. Did politics play a role in the selection or retention of any of these persons? A. Certainly not.

Q. How about race, Superintendent. I've asked you to identify for the ladies and gentlemen the race or ethnic background of these persons.

*Appendix A*

Is that a factor that you considered at the time in making this reorganization? A. No, certainly not, because that exempt group will make or break a superintendent. And I have to choose people whom I feel will do the job and command those different units in a professional and responsible way.

If I bring any other factors besides efficiency and effectiveness in that top command stucture of the Chicago

* * *

## APPENDIX B — JURY VERDICT OF AUGUST 8, 1988

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate: PLUNKETT

Case Number: 84C 689 / 85C 1905

Date: August 8, 1988

Case Title: MALONEY, *et al.* v. WASHINGTON, *et al.*

HAUGHEY, *et al.* v. WASHINGTON, *et al.*

ORDER

We, the jury, find for all the defendants and against the plaintiffs William Maloney and Joseph Haughey on both the racial and political discrimination claims. We, the jury find for the plaintiff Daniel O'Sullivan and against the defendants Fred Rice and Edwin Bishop on the racial discrimination claim and total actual damages in the amount of $30,000 is awarded to plaintiff O'Sullivan. We, the jury find for the defendants and against the plaintiff O'Sullivan on the political discrimination claims. We, the jury find for the plaintiff Russell Luchtenburg and against defendants Fred Rice and Edwin Bishop on the racial discrimination claim and total actual damages in the amount of $60,000 is awarded to plaintiff Luchtenberg. We, the jury find for all the defendants and against plaintiff Luchtenberg on the political discrimination claim. We, the jury find that punitive damages should be assessed against defendants Fred Rice and Edwin Bishop, and we award each of the plaintiffs Daniel O'Sullivan and Russell Luchtenberg sum of $1.00 from Fred Rice and $1.00 from Edwin Bishop.

*Appendix B*

Trial ends.

Plaintiffs oral motion to reinstate plaintiffs O'Sullivan and Luchtenberg as Chicago Police Officers, taken under advisement.

Status hearing set for August 11, 1988 at 10:15 a.m.

## APPENDIX C — MAGISTRATE'S REPORT AND RECOMMENDATION OF SEPTEMBER 20, 1985

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DISTRICT

MARSHALL CONSIDINE,

Plaintiff,

v.

PAUL GALL and FRED RICE, individually and in their official capacity, CHICAGO POLICE DEPARTMENT, and CITY OF CHICAGO,

Defendants.

No. 84 C 10013

REPORT AND RECOMMENDATION

TO THE HONORABLE JAMES F. HOLDERMAN, one of the Judges of the United States District Court for the Northern District of Illinois.

This case came before the court on plaintiff's motion for a temporary restraining order to prohibit defendants from reassigning plaintiff from his headquarters position as Special Employment Sergeant in the Special Functions group of the Patrol Division to a Patrol Division field assignment in the 16th Police District. Plaintiff alleges that his reassignment to the field, as well as his earlier transfer from the Crime Laboratory to the Special Functions group in September 1984, was brought about in

retaliation for his participation as a plaintiff in other litigation pending in this district entitled *Auriemma, et al. v. City of Chicago, et al.*, No. 84 C 1224, a case challenging the demotion of plaintiff and other formerly high-ranking police officials as politically motivated (herinafter "Auriemma"). On May 22, after the commencement of the hearing on the motion for a temporary restraining order and on the parties' joint motion, the motion for a temporary restraining order was converted into a motion for a preliminary injunction.

Plaintiff's complaint alleges, in pertinent part, that on December 2, 1983, he was demoted from his position as Director of the Chicago Police Department Crime Laboratory, a position he had held for approximately six years, and was replaced by defendant Paul Gall. Plaintiff resumed his career rank of sergeant and remained assigned to the Crime Laboratory. Thereafter, on February 7, 1984, plaintiff, along with 17 other similarly demoted members of the Chicago Police Department, filed the *Auriemma* lawsuit against the City of Chicago, Mayor Harold Washington, the Chicago Police Department and Police Superintendent Fred Rice, alleging that their demotions violated their rights under the First and Fourteenth Amendments. Three days later, Director Gall unsuccessfully sought to have plaintiff transferred out of the Crime Laboratory, explicitly stating as a reason the fact that plaintiff had filed suit to take away his job. Plaintiff further alleges that on Sepember 4, 1984, a few weeks after plaintiff signed an affidavit for use in the *Auriemma* litigation naming Gall as a supporter of Mayor Washington who was promoted to replace plaintiff because of his political connections, Gall, "in response to this affidavit," again requested plaintiff's transfer. As a result, on September 13, 1984, plaintiff was transferred to the Patrol Division, "a position which involves considerably less responsibility, and which is outside the area of [plaintiff's] long

time specialization." Complaint ¶13. The complaint seeks a declaratory judgment that the conduct of the defendants constitutes retaliation for the exercise of plaintiff's constitutional rights, injunctive relief requiring that plaintiff be restored to a position in the Crime Laboratory, punitive damages in the amount of $50,000.00, compensatory damages, costs and attorneys' fees.

On May 7, 1985, plaintiff filed his motion for a temporary restraining order. In his motion, he alleged that in violation of the Police Department's own policies and rules, defendants had ordered him reassigned from the Personnel Department of the Patrol Division, where he had been assigned since his transfer from the Crime Laboratory, to the 16th Police District. His motion alleged that this reassignment was further retaliation for his involvement in *Auriemma* and constitutes "punitive and malicious harassment." Motion, ¶2. The motion seeks to restrain defendants from carrying out this reassignment.

FINDINGS OF FACT

1. Marshall Considine joined the Chicago Police Department in 1956 as a patrolman. He served as a foot patrolman in the Albany Park District until March 1957 when he volunteered for and was detailed into a unit known as the Task Force, a group of approximately 100 motorcycle police officers assigned to look for guns, narcotics and gambling paraphernalia in high crime areas in the city. After approximately 1 1/2 years in this assignment, Marshall Considine was assigned to a special detail of the Task Force which was concerned with vice. In 1961, Marshall Considine was assigned to the robbery detail at 11th and State, from which, after approximately one year of service, he applied for and was accepted into a Chicago Police Department training program for crime scene technicians. After completing the program, Marshall

*Appendix C*

Considine was assigned to the Mobile Unit of the Chicago Police Department Crime Laboratory. Shortly after his assignment to the Crime Laboratory, Marshall Considine was promoted to the position of Police Lab Tech I, a Crime Laboratory position which provided the equivalent of detective's pay. In this position, Marshall Considine's duties included investigating major crime scenes; photographing, diagramming and searching crime scenes; removing physical evidence and fingerprinting. Approximately one year after his promotion to Lab Tech I, Marshall Considine was promoted to Lab Tech II, providing him with the equivalent of sergeant's pay. In 1966, after a competitive examination, Marshall Considine was promoted to sergeant. Pursuant to the request of the then Director of the Crime Laboratory, he was retained in the Crime Laboratory as a watch commander for approximately 90 days, whereupon he was promoted to Police Lab Tech III, a supervisory position providing the equivalent of lieutenant's pay. At some time thereafter, Sergeant Considine was made Commanding Officer of the Mobile Unit section, a position he held until 1972. In 1973, Sergeant Considine became Administrative Assistant to the Director of the Crime Laboratory. In 1974, Sergeant Considine became Commanding Officer of the Crime Scene Processing unit. This unit encompassed the Mobile Unit and the evidence technicians section and was responsible for the investigation of all major crime scenes within the city; it also provided assistance to suburban police departments. In this position, Sergeant Considine supervised approximately 90 people. In 1977, the Director of the Crime Laboratory, Captain Frances Flanagan, retired. Sergeant Considine was appointed Acting Director of the Crime Laboratory. Subsequently, Sergeant Considine was promoted to the position of Director of the Chicago Police Department Crime Laboratory. This promotion followed a competitive selection process. Public notice was given of a vacancy in the position. Sergeant Considine applied, and, after

being interviewed by a selection committee, was appointed by Superintendent James O'Grady. The Director of the Chicago Police Department Crime Laboratory is a member of the Chicago Police Department's exempt ranks. The exempt ranks include approximately 100 upper level executive police positions. (Considine, May 21, 57-66; Nowicki, May 8, 95.)[1]

2. Sergeant Considine graduated from a two-year program at Wright Junior College and subsequently accumulated approximately one year's worth of additional college credit. He graduated from a six-week police management course at Northwestern University and a three-month course given by the F.B.I. National Academy. He has taken several specialized courses relating to the work of the Crime Laboratory given by or through the Chicago Police Department. (Considine, May 21, 68-69.)

3. Sergeant Considine is past president of the F.B.I. National Academy Associates of Northern Illinois and vice-president of the F.B.I. Academy Associates of Illinois. He has lectured on crime laboratory procedures and case investigation for, among others, the Illinois Department of Law Enforcement, the University of Louisville, Northwestern University, John Marshall Law School, the University of Georgia and Florida Institute of Law Enforcement. (Considine, May 21, 70.)

4. On December 2, 1983, Sergeant Considine was called into the office of Police Superintendent Fred Rice and told that he was being demoted from the exempt rank of Director of the Crime Laboratory to his career service rank of sergeant. He was told

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1. References are to the transcript of the hearing on plaintiff's motion for a preliminary injunction and include the name of the witness, the date of the testimony and the page of the transcript for that date.

that he had done a commendable job, but was being replaced by someone whose management style was more compatible with the Superintendent's. The Superintendent told Considine that he was going to be retained in the Crime Laboratory. (Considine, May 21, 72-73; Rice, May 17, 68.)

5. Paul Gall, Sergeant Considine's replacement as Director of the Chicago Police Department Crime Laboratory, joined the Chicago Police Department as a patrolman in the Albany Park District in 1957. In 1958, he was assigned as a youth officer, a position in which he served until January 1, 1961, when he was promoted to sergeant. He served as a patrol sergeant in the Town Hall district until, following a competitive examination, he was promoted to lieutenant on October 1, 1961. He was then assigned to the Shakespeare district where he served for approximately one year. He was then selected to attend Northwestern Traffic Institute where he completed the nine-month course. Upon his return to the Chicago Police Department, he was assigned to spend six months in the Research and Development Division working on the generation of innovative ideas for then Superintendent O.W. Wilson. Thereafter, Lieutenant Gall served in the Humboldt Park and Wood Street districts. On March 23, 1965, pursuant to a competitive examination, Lieutenant Gall was promoted to Captain of Police. As a captain, Gall served in the Patrol Division in the Englewood, Wood Street and Fillmore districts and as a relief captain providing vacation relief for a number of different districts. (Gall, May 22, 55-62.)

6. Captain Gall holds a two-year degree from Wright Junior College and a Master of Public Administration degree from the Illinois Institute of Technology, which he attended while a member of the Chicago Police Department during the 1960's. In December of 1983, shortly after being appointed Director of the Chicago

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Police Department Crime Laboratory, Captain Gall received a Doctor of Public Administration degree from Nova University in Florida. (Gall, May 22, 62-64.)

7. On December 2, 1983, Captain Gall was called into the ofice of Superintendent Fred Rice. He was told that Superintendent Rice knew of his "educational and managerial talents" and wanted him to be the Director of the Crime Laboratory. (Gall, May 22, 65.)

8. Prior to his appointment as Director of the Crime Laboratory, Captain Gall had had no prior direct contact with Superintendent Fred Rice or with Sergeant Considine. He learned from Superintendent Rice that his predecessor was Sergeant Considine. Captain Gall never applied for the position of Crime Laboratory Director and had no notice, prior to December 2, 1983, that he was being considered for the position. (Gall, May 22, 67, 162-164.)

9. Mayor Harold Washington appointed defendant Fred Rice to Superintendent of the Chicago Police Department on August 23, 1983. Defendant Rice has served continuously in that position to the present time. As Superintendent, Rice is the chief executive officer of the Chicago Police Department and is the official responsible under Illinois law for its operations and actvities. (Rice, May 17, 54, 75-76.)

10. Defendant City of Chicago is a municipal corporation organized under and subject to the laws of the State of Illinois. The Chicago Police Department is an agency of defendant City of Chicago.

11. Shortly after his appointment as Director of the Crime

Laboratory, Captain Gall had to travel to Fort Lauderdale, Florida, to defend his doctural dissertation. He was away from the Crime Laboratory for approximately four to six days. (Gall, May 22, 66.)

12. Following his demotion, Marshall Considine remained at work in the Crime Laboratory for a period of approximately ten days to two weeks. He then took a furlough and was away from the Crime Laboratory for two to three weeks over the Christmas holidays. (Considine, May 21, 74.)

13. At some time after his appointment as Director of the Crime Laboratory, either in mid-December before Sergeant Considine's furlough (Gall, May 22, 67-68) or in January 1985, soon after Sergeant Considine returned from his furlough (Considine, May 22, 181), Director Gall took Sergeant Considine to lunch at a Greek restaurant on Halsted Street. According to Director Gall, "the sole purpose of that meeting was to solicit Sergeant Considine's cooperation and his input as a person who had been Director of the Crime Laboratory now for six or eight years." (Gall, May 22, 68.) The luncheon was cordial. (Gall, May 22, 68-69.)

14. On December 19, 1983, Director Gall requested the promotion of Sergeant Considine to the position of Lab Tech III, the position Considine had held before becoming Director of the Crime Laboratory. The salary of a Lab Tech III is higher than that of a police sergeant and roughly the equivalent of the salary of a police lieutenant. (Gall, May 22, 69; Considine, May 21, 74-75, 61-62; Pl. Ex. 11 A and B.) This promotion request was approved shortly thereafter by Deputy Superintendent Rodriguez who sent it on through ordinary channels for the additional approvals required. (Rodriguez, May 10, 60.)

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15. During the period from December 2, 1983, through February 7, 1984, Sergeant Considine assisted Director Gall in formalizing Director Gall's membership in the American Society of Crime Laboratory Directors. (Considine, May 22, 174-175.)

16. During the period from December 2, 1983, through February 7, 1984, Director Gall and Sergeant Considine were present together in the Crime Laboratory for a maximum of five weeks. During this period, Director Gall never counselled Marshall Considine or advised him that his performance was unsatisfactory. During this period of time, Director Gall's request for a promotion for Marshall Considine was pending. (See 14 above; Gall, May 22, 154-155; Considine, May 21, 79-80; Rodriguez, May 10, 61.)

17. On February 7, 1984, Sergeant Considine and seventeen other formerly exempt rank police officers who had been demoted by Superintendent Rice on December 2, 1983, filed suit challenging their demotions on due process and First Amendment grounds. *Auriemma, et al. v. City of Chicago, et al.*, No. 84 C 1224.

18. On or about February 8, 1984, Director Gall learned about the *Auriemma* suit from a newspaper article. From this article, Director Gall understood the suit to charge "that all of us that were appointed by Superintendent Rice were more or less a bunch of political appointees and that was our sole qualification for our appointment and that the plaintiffs in the case were . . . attempting to get their jobs back . . . . " Director Gall took the news of this lawsuit in a personal manner. He testified that his "feelings were hurt" and he was angry with himself for having kept Marshall Considine in the Crime Laboratory after he was demoted. (Gall, May 22, 75-76.)

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19. On February 10, 1984, Director Gall wrote a memo to his supervisor, Deputy Superintendent Matt Rodriguez, informing Rodriguez that "my predecessor has filed suit asking my removal as unqualified, stating my appointment as Director of the Crime Laboratory was political." Gall's memo stated that the suit placed him "in the untenable position of having a subordinate sharing my office who has publicly stated that I am unqualified for the job of Director of the Crime Laboratory. He has filed suit to take away my job." Director Gall requested that a conference be set up with the Corporation Counsel "to ascertain what action can be taken to remove Marshall Considine form his position in the Crime Laboratory." (Exhibit C to plaintiff's Complaint; Gall, May 22, 76-77.) Director Gall hand-carried his memorandum to the office of Deputy Superintendent Rodriguez. (Gall, May 22, 77.)[2]

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2. The Gall memorandum, in its entirety, reads as folows:

> It has been brought to my attention that my predessor [sic] has filed suit asking my removal as unqualified, stating by appointment as Director of the Crime Laboratory was political.
>
> The former Director has been treated with a charity well beyond basic requirements [sic]. He has been retained in a supervisory position within the Crime Laboratory in spite of a lack of personal enthusiasm. I feel that he has been afforded every opportunity to demonstrate whatever latent managerial talent that he may possess.
>
> Marshall Considine has not demonstrated that he has either the ability or the personal desire to cooperate with the current management of the Crime Laboratory. He has placed me in the untenable position of having a subordinate sharing my office who has publicly stated that I am unqualified for

(Cont'd)

20. Deputy Superintendent Rodriguez refused to act on Director Gall's memo, stating that, to the extent Director Gall's reasons for seeking Sergeant Considine's removal from the Crime Laboratory were related to the lawsuit, "that was personal and . . . in no way would I accept this report or approve it." Rodriguez also concluded that Director Gall was angry and that the memorandum contained inappropriate "personal digs" such as its sarcastic reference to Sergeant Considine's "latent managerial talent." Rodriguez told Gall "that as a manager he has got to go back and reflect on things not out of anger but as a manager"; and he "told him also in no uncertain terms that I did not appreciate the personal digs. . . ." (Rodriguez, May 10, 71, 122-123, 133.)

21. There is a difference in personality and working style between Paul Gall and Marshall Considine. With respect to personality, Sergeant Considine, who in comparison to Director Gall has a serious and somewhat introverted manner, appeared to Director Gall to be "petulant." (Gall, May 22, 74, 155.) With respect to working style, there appears to have been a serious lack of communication between the two men. While Sergeant Considine looked to Director Gall to delegate certain specific

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(Cont'd)

> the job of Director of the Crime Laboratory. He has filed suit to take away my job.
>
> This creates an impossible situation. Personal loyalties within the laboratory will be strained, and effective management difficult. I respectfully request a conference with the Corperation [sic] Counsel to ascertain what action can be taken to remove Marshall Considine from his position in the Crime Laboratory.

Exhibit C to the Complaint.

responsibilities to him, Director Gall appears to have viewed his role as a manager as less directive, and he failed to make clear to Sergeant Considine what he expected Sergeant Considine to do. Before leaving for his furlough in December 1983, Sergeant Considine asked Director Gall to clarify his duties. Director Gall did not do so, but told Sergeant Considine that he would do so at a later time. When Sergeant Considine returned from his furlough in January, he again spoke to Director Gall about clarifying his duties, and again Director Gall responded that they would discuss it later. This kind of interchange took place on more than one occasion. (Considine, May 21, 74-76; Considine, May 22, 180-181; Gall, May 22, 129, 154-155.) Director Gall said that he responded on one occasion to a request from Sergeant Considine regarding clarification of his duties by telling him "I wanted his input on mostly everything." (Gall, May 22, 123, 140.) Gall also said that he expected Considine "to act as more or less my aide" and saw his (Considine's) role as providing "general assistance to the Director." (Gall, May 22, 129, 140.) While Director Gall testified that he gave Sergeant Considine "a number of things" to do, the only assignment Director Gall could specifically recall was itself rather indefinite and open-ended, being a "report on how the Lab ran." (Gall, May 22, 79, 122.)[3]

22. The court finds that Sergeant Considine's failure to satisfy Director Gall's expectations stemmed primarily from Director Gall's inability to make his expectations clear, due in large part to Director Gall's failure, because of other demands of his new

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3. Director Gall testified that he never received this assigned work back. Since, however, there was no testimony as to when the assignment was given or when Director Gall expected to receive it back, the incident cannot be placed chronologically and thus is of no assistance in evaluating Director Gall's motivation in writing the February 10 memo.

position to pay adequate attention to the issue of the effective utilization of Sergeant Considine. Director Gall's testimony made clear that at the outset, he had no definite idea of what Crime Laboratory personnel were doing or should be doing; he stated, "I was trying to get a handle on everything that was going on around me and there were so darn many problems and so many things to do, too many balls in the air at the same time." While Director Gall's distractions may not have significantly interfered with the performance of other Crime Lab employees, the problem of how to utilize the former Director was a difficult issue which Director Gall failed meaningfully to address. (Gall, May 22, 156-57, 160-61.) In any event, Director Gall never clarified Sergeant Considine's duties and never delegated any ongoing responsibilities to him. (Gall, May 22, 122, 129; Considine, May 22, 181.) As a result, Sergeant Considine occupied himself in early 1984 largely with activities he took on himself such as manning the Mobile Unit desk. In addition, he performed certain specific tasks which had been assigned him by Director Gall; for instance, Considine was asked to work on requisitions and he did so. (Considine, May 21, 76; Gall, May 22, 123-124.)

23. Director Gall's initially vague and expansive view of the functions Marshall Considine could serve in the Crime Laboratory ("I wanted his input on mostly everything") did not amount to the kind of clarification Sergeant Considine needed and repeatedly requested. Moreover, Director Gall's ideas for utilizing Sergeant Considine in early 1984 were largely inchoate and disorganized. Moreover, Director Gall failed to delegate any meaningful authority to Sergeant Considine. Thus, while stating that he wanted Sergeant Considine to work on the budget, Director Gall requested that another individual, James Hickey, be detailed into the Crime Laboratory to work on the budget. With respect to involving Sergeant Considine in the budgeting process, he and Hickey merely

asked Considine questions on the budget "a couple of times." (Gall, May 22, 74.)

24. The filing of the *Auriemma* litigation triggered Director Gall's decision to seek the removal of Sergeant Considine from the Crime Laboratory on February 10, 1984. Director Gall and Sergeant Considine had been in the Crime Laboratory together for only five weeks. Director Gall himself testifited that the lawsuit "was a contributory factor" and that it "was a contributing factor to write the memo at that particular time. . . ." (Gall, May 22, 152.) The filing of the *Auriemma* litigation "precipitated" Director Gall's decision to give up on and get rid of Sergeant Considine after the brief period of time that had passed since Director Gall's assumption of the Crime Laboratory directorship.

25. After the filing of the *Auriemma* litigation, the relationship between Director Gall and Sergeant Considine deteriorated, despite the fact that Sergeant Considine's behavior was essentially unchanged. (Rodriguez, May 10, 72; Gall, May 22, 79; Considine, May 21, 80; May 22, 171-172.) Director Gall's response to the *Auriemma* lawsuit was a factor which contributed to this deterioration.

26. Following the filing of the *Auriemma* litigation, Director Gall gave Sergeant Considine few assignments, perceiving it as a "lost cause" to ask Sergeant Considine questions or give him assignments. (Gall, May 22, 79.) Sergeant Considine testified that he felt that he had been "designated as a nonperson out of George Orwell's 1984." (Considine, May 21, 80.)

27. Prior to the filing of the *Auriemma* litigation, Director Gall had never complained to his supervisor about Sergeant Considine. After Director Gall's February 10 memorandum,

Director Gall began criticizing Sergeant Considine to Deputy Superintendent Rodriguez. (Rodriguez, May 10, 106, 113.)

28. In April 1984, Director Gall withdrew his request for a promotion for Sergeant Considine. (Rodriguez, May 10, 61.)

29. Beginning in approximately May or June 1984, Director Gall began excluding Sergeant Considine from supervisory meetings in the Crime Laboratory. (Gall, May 22, 105; Considine, May 21, 88.)

30. There was no evidence that Sergeant Considine was ever insubordinate or ever made derogatory statements, in public or in private, concerning Director Gall's abilities or policies.

31. It is a matter of both policy and practice within the Chicago Police Department for individuals to be talked to and counselled in cases of unsatisfactory performance and particularly in cases of deteriorating performance. (Townsend, May 8, 54-55; Nowicki, May 8, 78-81, 85-87; Rodriguez, May 10, 90-99; Pl. Exs. 6, 7, 8, 21 at p.11.)

32. At no time before or after the filing of the *Auriemma* litigation did Director Gall counsel Marshall Considine or otherwise speak to him regarding any perceived deficiencies in his performance. (Gall, May 22, 153; Considine, May 21, 86.) Indeed, at no time did Director Gall and Sergeant Considine engage in any extended conversation. (Considine, May 21, 86.)

33. The court finds that prior to the filing of the *Auriemma* lawsuit, Director Gall was frustrated by Sergeant Considine's failure to satisfy his expectations, that that failure was not Sergeant Considine's fault but stemmed from Director Gall's failure to

make his expectations clear, and that the filing of the lawsuit substantially increased Director Gall's frustration with Sergeant Considine.

34. On September 4, 1984, Director Gall again requested the reassignment of Sergeant Considine. In his memorandum requesting the transfer, he also requested that Sergeant Francis Kehoe be transferred into the Crime Laboratory. (Pl. Ex. 14B.) This time, Deputy Superintendent Rodriguez approved the request. (Gall, May 22, 80; Pl Ex. 14A.) He did not question Director Gall concerning his reasons for wanting to transfer Sergeant Considine out of the Crime Laboratory. (Rodriguez, May 10, 81.) Sergeant Considine's transfer was effective on or about September 13, 1984. (Pl. Ex. 4.)

35. Director Gall never, after February 10, 1984, viewed Sergeant Considine as a viable member of the Crime Laboratory staff.

36. Prior to the publication of the actual transfer order, but after Marshall Considine's transfer had been approved, Sergeant Considine had a conversation with Chief of the Patrol Division William Keating. Chief Keating asked Sergeant Considine if he would be willing to work in Patrol Division Headquarters in the position left open by Sergeant Kehoe's transfer into the Crime Laboratory. Sergeant Considine told Chief Keating that he would be happy to take on that position. (Considine, May 21, 89-90.)

37. All transfer requests must be approved by First Deputy John Jemilo and then approved by Superintendent Fred Rice. (Nowicki, May 8, 68, 88.) The Considine-Kehoe swap was discussed with Superintendent Fred Rice by Deputy Superintendent Rodriguez and approved by Superintendent Rice. (Rice, May 17,

102-104.) It may have been discussed by Chief Keating with First Deputy Jemilo. (Jemilo, May 15, 149.)

38. The duties required of most Crime Laboratory personnel involve specialized technical skills. (Rodriguez, May 10, 131.) It is highly unusual to involuntarily reassign experienced personnel out of the Crime Laboratory. No one was transferred or detailed involuntarily out of the Crime Laboratory during Marshall Considine's 23 years there. (Considine, May 21, 70-71.)

39. The reassignment of supervisory personnel,[4] when not initiated by the member himself, does not normally take place in the Chicago Police Department without some effort to consult with the member and apprise him of what is happening and why. Such counselling is a matter of Chicago Police Department policy and practice, as well as of good police management. (Townsend, May 8, 54-55; Nowicki, May 8, 78, 80-81, 85-87; Rodriguez, May 10, 90-99; Pl. Exs. 6, 7, 8, 21 at p. 11; Considine, May 21, 71.) Director Gall did not engage in any such counselling or consultation with Sergeant Considine. (Gall, May 22, 154-155.)

40. Upon his transfer, Sergeant Considine was assigned to work as the Special Employment sergeant in the Special Functions group of the Patrol Division under Lieutenant Ronald C. Garcia. (Garcia, May 10, 6-8.) This was the position which had been held by Sergeant Kehoe for the preceding 2-1/2 years. (Garcia, May 10, 4.) In this position, Sergeant Considine was responsible for supervising the police officers who schedule officers for the Special Employment Program, for scheduling a segment of police officers himself and for supervising all supervisors assigned to Special

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4. The supervisory ranks are the ranks of sergeant and above. (Brzeczek, May 21, 8.)

Employment. (Garcia, May 10, 8.) The job involved dealing with the "considerable pressure" that may be applied to induce the Special Employment sergeant to favor specific individuals. (Considine, May 21, 100.) Prior to taking on the assignment, Sergeant Considine had been advised by Sergeant Kehoe that the job was a "pressure job." (Considine, May 21, 89.)

41. On November 21, 1984 approximately two months after his transfer, Sergeant Considine filed the instant suit, complaining that his transfer out of the Crime Laboratory constituted retaliation for the exercise of his First Amendment rights in filing suit in *Auriemma, supra.*

42. Chicago Police Department personnel receive efficiency ratings twice a year. They are rated on a scale of 0-100 on quality of work, quantity of work, dependability, personal relationships and attendence/promptness. During the period he was Director of the Crime Laboratory, Marshall Considine was not rated, but prior to becoming Director, his usual marks were in the mid or high 90's range. His last mark prior to becoming Director was 99. (Dep. Notice 84-73; Considine, May 21, 64.)

43. On November 29, 1984, approximately one week after the filing of the instant lawsuit, Director Gall prepared an evaluation of Sergeant Considine. In this evaluation, Director Gall stated that Sergeant Considine had "refused to voluntarily provide any work" and "had to be *specifically* instructed to produce anything" and that Sergeant Considine was "petulant, pouted, uncommunicative — uncooperative with peers and superiors." Director Gall gave Sergeant Considine an overall performance rating of 75, indicating "minimally acceptable performance." (Pl. Ex. 16; Dept. Notice 84-73.)

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44. Director Gall testified that he could not recall whether he was aware of the suit filed against him on November 21 when he prepared his performance rating of Sergeant Considine on November 29. (Gall, May 22, 106-107.) There was no evidence that the suit had been brought to Director Gall's attention prior to the preparation of the evaluation, and the court makes no finding in this regard.

45. While the Department Notice governing performance ratings in effect at the time Director Gall evaluated Sergeant Considine (#84-73) states that "[a] member's grade should not fluctuate greatly from period to period without sufficient cause" and counsels that ratings should not unfairly reject biases of individual supervisors, the rating given to Sergeant Considine by Director Gall was dramatically inconsistent — by 20 points — with any rating ever given to Sergeant Considine before or since. Nevertheless, Director Gall made no effort to counsel Sergeant Considine, to check with other supervisory personnel about Sergeant Considine's performance or in any way to determine the reason for the precipitous decline in Sergeant Considine's performance represented by Director Gall's rating.

46. William F. Keating is Chief of the Patrol Division of the Chicago Police Department and a member of the exempt ranks. He reports directly to First Deputy Superintendent John Jemilo and supervises, among other persons, John J. Townsend, the Deputy Chief of the Patrol Division Special Functions group. Deputy Chief Townsend is the supervisor of Lieutenant Ronald Garcia who was Sergeant Considine's supervisor while Sergeant Considine served as Special Employment Sergeant. (Keating, May 15, 70-73.)

47. Within the Chicago Police Department, personnel are

assigned in one of two ways, by transfer and by detail. A transfer is regarded as a permanent move whereas a detail is considered temporary, although it may be used in some circumstances to reassign someone pending a formal transfer order or where, for various reasons (usually budgetary), a formal transfer is not possible. (Rodriguez, May 10, 141-143; Zaleski, May 8, 24; Nowicki, May 8, 91; Brzeczek, May 21, 10-11.)

48. The police-year is divided into thirteen 28-day police periods, and departmental operations, including transfers, normally occur at the change date between police periods. Thursdays is always the change date, and transfer orders are published on the preceding Monday evening or Tuesday morning. (Brzeczek, May 21, 6-7, 11.)

49. A detail is usually of a temporary nature and is of no specific time duration; when an officer is detailed, all his paperwork remains in the district from which he was detailed. While transfers take place at the police period change date and provide for prior notice to the member and to the personnel of the two assignments involved, details can take place at any time on a close to immediate basis. Among the usual reasons for details are to be able expeditiously to meet an immediate, identifiable need on the part of the Department; to fill the need of a unit that needs an individual but does not have a line item in its budget for such an individual; and to act quickly where necessary to meet the need of a member (such as where a member needs to be removed from a stressful assignment quickly). (Rodriguez, May 10, 141-143; Nowicki, May 8, 91; Brzeczek, May 21, 12.)

50. On the morning of April 29, 1985, approximately eight months after Sergeant Considine's transfer to the Special Functions Group, Chief Keating met with First Deputy Jemilo. At that

meeting, First Deputy Jemilo instructed Chief Keating to move Sergeant Considine into a field position in a district. First Deputy Jemilo led Chief Keating to believe that this directive came from Superintendent Rice. It was part of First Deputy Jemilo's instructions to Chief Keating that the movement of Sergeant Considine be accomplished as soon as possible, even though the Police Department was in the middle of a transfer period and the reassignment would have to be accomplished by detail rather than transfer. While he was ordered to move Sergeant Considine into the field, Chief Keating was left with complete discretion as to where in the field to place Sergeant Considine. (Keating, May 15, 78-85; Jemilo, May 15, 119-120, 126.)

51. Although Chief Keating asked First Deputy Jemilo why Sergeant Considine was to be reassigned, he was given no reason other than the indication that the directive had come from the Superintendent. (Keating, May 15, 79-80, 85.) First Deputy Jemilo told Chief Keating that the duties previously performed by Sergeant Considine were to be given to one of the other sergeants or shared by them. (Jemilo, May 15, 162.)

52. Later on in the morning of April 29, 1985, Chief Keating informed Sergeant Considine that, pursuant to instructions from the First Deputy Superintendent, he was to be "detailed" out of Patrol Division Headquarters and into a district in the field. Chief Keating told Sergeant Considine that First Deputy Jemilo had informed him that First Deputy Jemilo was acting pursuant to the direction of Superintendent Rice, as Jemilo had led Keating to believe. When Sergeant Considine asked where he was going, Chief Keating said, "I told him that I would keep him close to home, that I would consider where he lived and everything, and that I wasn't out to hurt him. . . ." (Keating, May 15, 78-82.)

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53. Neither Chief Keating nor anyone under his supervision had requested that Sergeant Considine be moved out of his position as Special Employment Sergeant. Chief Keating understood Sergeant Considine to be doing a good job. Lieutenant Garcia, Sergeant Considine's immediate superior, did not want him moved. (Keating, May 15, 76-78.)

54. The decision to instruct Chief Keating to move Sergeant Considine into the field was reached at a meeting between Superintendent Rice and First Deputy Jemilo early on the morning of April 29. Sergeant Considine was specifically discussed at this meeting by name. (Jemilo, May 15, 122-123; Rice, May 17, 56-57.) Both Superintendent Rice and First Deputy Jemilo were aware at the time that Sergeant Considine was a plaintiff in the *Auriemma* case. (Rice, May 17, 57; Jemilo, May 16, 95.) First Deputy Jemilo initially made the suggestion to move Sergeant Considine. (Jemilo, May 15, 123-124.)

55. It was First Deputy Jemilo's testimony that he decided that Sergeant Considine should be moved to a district because the position of Special Employment sergeant was a "make work" position that "did not need a full duty sergeant." (Jemilo, May 15, 142.)

56. While this court cannot independently determine from the evidence presented whether or not the duties carried out by Sergeant Considine in his position as Special Employment Sergeant actually justified the assignment of a full-duty sergeant, it finds the evidence concerning how and why First Deputy Jemilo reached the decision to move Sergeant Considine, and in particular the decision to move Sergeant Considine immediately, inadequate to support a finding of good faith, non-retaliatory basis for this employment action. Specifically:

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(1) First Deputy Jemilo testified that he became aware that the position held by Sergeant Considine from September 1984 to April 1985 was a make-work position prior to December 1983, when Jemilo had been Administrative Deputy Chief of Patrol. Nevertheless, he never sought to terminate the position while it was held by Sergeant Kehoe, and he had approved the transfer of Sergeant Considine into the position eight months earlier. (Jemilo, May 15, 144-146, 151, 154.)

(2) First Deputy Jemilo also testified, in testimony that appears inconsistent with that set forth above, that he did not know that the position was a make-work position until he looked into it shortly before he decided to seek Sergeant Considine's reassignment. (Jemilo, May 15, 144, 150, 152.)

(3) In deciding to move Sergeant Considine out of the Special Functions group, First Deputy Jemilo testified that he considered whether Sergeant Considine was needed given the presence of two other full duty sergeants and the specific jobs that the three sergeants did. In testifying at the hearing, which took place only a few weeks after April 29, First Deputy Jemilo described the three sergeants' duties from written job descriptions prepared by his subordinates *after* April 29 and in preparation for the litigation, in order to aid his testimony. (Jemilo, May 16, 79-87.) Moreover, First Deputy Jemilo testified, in a manner that appears at least facially inconsistent

with his testimony in (1) above, that prior to the week preceding April 29, he was only "generally familiar with the assignments, and the positions held, and the activities that were performed by the sergeants that were assigned to that unit." (Jemilo, May 16, 80.)

(4) Despite the fact that a sergeant had held the Special Employment position for more than three years, First Deputy Jemilo testified that he concluded that Sergeant Considine should be moved immediately rather than waiting the approximately two weeks until the end of a police period when a more orderly and ordinary transfer could take place. The explanation given for moving Sergeant Considine in the middle of a transfer period, that it would have been "wasteful" to keep him in the position for an additional two weeks, failed, in this court's view, to account for the precipitous manner in which Sergeant Considine's movement was effectuated and suggested that the needs, expectations and standing of the member were counted of no consequence in the decision, contrary to all testimony concerning Chicago Police Department management practices. (Jemilo, May 15, 144.)

(5) First Deputy Jemilo decided that Sergeant Considine should be moved immediately without identifying the district to which he should be sent. Thus First Deputy Jemilo was not acting in response to any specific emergency need of the sort that would normally justify a mid-transfer period

reassignment. While Sergeant Considine was ultimately sent to the 16th District, where there is a shortage of sergeants, that shortage is of a chronic rather than an emergency nature, and the Commander of that District, when he heard that Sergeant Considine was being detailed into the district, arranged to allow him to take some time off before reporting in person, thus demonstrating that his district's needs did not require emergency action. (Jemilo, May 15, 120, 136-137; Jankowski, May 10, 146-147.) At the time of the hearing in this matter, Sergeant Considine had not yet begun to work in the 16th District. (Jankowski, May 10, 147.)

(6) First Deputy Jemilo made the decision to move Sergeant Considine into a field position without knowledge of or inquiry into Sergeant Considine's background, training or experience. (Jemilo, May 16, 121.)[5] Moreover, he made the decision with no attempt to consult with Sergeant Considine, counsel him, or give him prior notice or explanation.

(7) First Deputy Jemilo knew that Sergeant Considine would in all likelihood view this reassignment as undesirable. One year earlier a sergeant similarly reassigned had resigned rather

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5. The court notes that the decision to move Sergeant Considine to a district was consistent with Superintendent Rice's general policy of seeking to strengthen the Patrol Division presence in the field. Since not every sergeant in the Chicago Police Department has been sent to the field, however, the fact that what was

done here is *consistent* with a general policy does not establish that the general policy *caused* Sergeant Considine's reassignment.

> than accept a reassignment to the field. (Jemilo, May 15, 140.)
>
> (8) In making his decision that Sergeant Considine was in a make-work position and should be moved out of it immediately, First Deputy Jemilo never consulted with anyone in the Patrol Division, neither with Sergeant Considine's supervisors in the Special Functions group nor with Chief Keating. (Jemilo, May 15, 155-156.) It appears from the evidence presented that a decision by the First Deputy to eliminate a supervisory position in the Patrol Division, without consultation with any of the administrators of the Patrol Division, is extraordinary and contrary to normal procedure. First Deputy Jemilo's failure to seek input from the Patrol Division suggests that the needs of the Patrol Division did not constitute the primary motivation for the decision.

57. The functions previously performed by Sergeant Considine as Special Employment sergeant have been divided among a number of individuals with a police officer doing the scheduling and the two other Special Functions Group sergeants splitting the supervision of the program. (Garcia, May 10, 8-9.)

58. Except where the union contract requires otherwise, the usual and ordinary practice of the Chicago Police Department is for requests for reassignment to come from supervisors in the sending or receiving unit or from the member being reassigned; this is the practice where the person being reassigned is in the

supervisory ranks, sergeant or above. In the Patrol Division, it is the usual and ordinary practice for Chief Keating to evaluate such requests and make a recommendation to First Deputy Jemilo who, if he agrees with Chief Keating's recommendation, obtains the approval of Superintendent Rice. (Nowicki, May 8, 80; Keating, May 15, 104; Jemilo, May 16, 120.) Insofar as can be determined from the evidence presented at this hearing, the procedure followed in Sergeant Considine's case, in which the First Deputy decided to move supervisory personnel within the Patrol Division without consulting with the Chief of the Patrol Division, is inconsistent with Chicago Police Department management practices.

59. There is a tradition in the Chicago Police Department, attributed by the present Superintendent exclusively to previous administrations, of using transfers and reassignments for punitive purposes. (Rice, May 17, 117-122.) There is a perception in the Chicago Police Department that transfers and reassignments may be utilized for punitive purposes.

60. The manner in which Sergeant Considine was treated following the filing of the *Auriemma* litigation was perceived by other department members as being punitive in appearance. *(See generally* Nowicki, May 8, 85; Keating, May 15, 99; Jankowski, May 10, 146-148.) Sergeant Considine testified that in informing him on April 29 that he was to be reassigned, Chief Keating said, "Jemilo is sending you to the district. What have you done lately to offend someone?" (Considine, May 21, 103.) Chief Keating, recalling the conversation in less explicit terms, nevertheless indicated his discomfort with the reassignment: "I believe I asked him words to the effect if he knew why-if he knew why this was happening" and testified that he could have asked Sergeant Considine whom he had upset lately. (Keating, May 15, 99.) the

same discomfort was evident in Commander Jankowksi's reaction to the reassignment. (*See* Jankowski, May 10, 145-147.)

61. On April 29, 1985, the day Chief Keating and Sergeant Considine were informed that Sergeant Considine was to be detailed to a district, Lieutenant Garcia evaluated Sergeant Considine, giving him an overall efficiency rating of 95, consistent with all of Sergeant Considine's prior evaluations except that given him by Director Gall. Lieutenant Garcia's evaluative comments included the statements that "work is always complete and acceptable... motivates subordinates to excellence . . . does more than his position requires" and "has maintained good relationships with supervisors-peers-subordinates." (Pl. Ex. 9A,B.) A 95 rating is considered excellent. (Garcia, May 10, 5.)

62. Details such as occurred in Sergeant Considine's case are not the routine way in which personnel are moved in the Chicago Police Deparment absent identifiable emergency needs or budget considerations as outlined above, nor are mid-period changes routine. Permanent non-voluntary reassignments of persons in the supervisory ranks are uncommon. Detail or transfer orders not preceded by any consultation with the member, particularly when the member is in the supervisory ranks, diverge significantly from routine or ordinary practice. (Nowicki, May 8, 84-87, 91; Pl. Exs. 6,,7,8.)

63. At the time of his detail to the 16th District, Marshall Considine had not held a field position for approximately 23 years.

64. There is currently a shortage of supervisory personnel in the Crime Laboratory. (Rodriguez, May 10, 108-111; Gall, May 22, 141.)

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65. The position held by Marshall Considine in the Special Functions group in the Patrol Division headquarters remains open and unfilled. (Keating, May 15, 82.)

CONCLUSIONS OF LAW

The standards for determining a motion for a preliminary injunction are well-established in this circuit. In order to be entitled to a preliminary injunction, plaintiff must demonstrate that:

> 1. He has a reasonable liklihood of success on the merits; and
>
> 2. He has no adequate remedy at law or will be irreparably harmed if the injunction does not issue; and
>
> 3. The threatened injury to plaintiff if the injunction is not granted outweighs any harm that may accrue to the defendants from the requested injunction; and
>
> 4. The granting of the preliminary injunction will not disserve the public interest.

*Roland v. Air Line Employees Association, International,* 753 F.2d 1385, 1392 (7th Cir. 1985). These factors will be examined in light of the evidence presented at the preliminary injunction hearing held before this court.

I. *Likelihood of Success on the Merits*

To prove that his transfer from the Crime Laboratory and

his detail from the Special Function group to the 16th Police District were acts of retaliation for the excercise of his First Amendment rights, plaintiff will be required to demonstrate at trial, by a preponderance of the evidence, that he engaged in constitutionally-protected activity and that that activity was a substantial or motivating factor in the reassignments of which he complains. *Givhan v. Western Line Consolidated School District,* 439 U.S. 410, 416 (1979); *Mount Healthy City School District Board of Education V. Doyle,* 429 U.S. 274, 284-85 (1977).

To carry his initial burden, plaintiff need show only that his protected conduct was a substantial factor in the employment actions he challenges. He is not required to show that protected conduct was the exclusive basis for the employment actions. *McClure v. Cywinski,* 686 F.2d 541, 545 (7th Cir. 1982).[6] Once the plaintiff has shown that constitutionally protected conduct was a substantial factor in the employment decisions he challenges, the defendants are entitled to show by a preponderance of the evidence that they would have reached the same employment decision in the absence of the protected conduct. *Givhan, supra* at 416. Plaintiff is then entitled to rebut defendants' evidence by showing that the rationale they presented for the challenged employment action is merely pretextual. *Morris v. Washington Metropolitan Area Transit Authority,* 702 F.2d 1037, 1045 (D.C. Cir. 1983).

It must be kept in mind that at this stage in the litigation,

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6. It is well-established in this circuit that retaliation can take the form of a retaliatory transfer as well as a retaliatory discharge. "The test is whether the adverse action taken by the defendants is likely to chill the exercise of constitutionally protected speech. This chilling effect can be accomplished through an unwanted transfer as well as through outright discharge." *McGill v. Board of Education,* 602 F.2d 774, 780 (7th Cir. 1979) (citation omitted).

a hearing on plaintiff's motion for a preliminary injunction, the court can do no more than decide where, from the evidence presented at the preliminary injunction hearing, the likelihood of success on the merits appears to lie.

It is clear at the outset that Sergeant Considine's participation as a plaintiff in the *Auriemma* litigation is conduct protected by the First and Fourteenth Amendments. The right to petition the courts is protected by the Bill of Rights. *California Motor Transport Company v. Trucking Unlimited,* 404 U.S. 508, 510 (1972). Accordingly, litigating a claim is a protected activity. *See Bowen v. Watkins,* 669, F.2d 979, 982 n. 2 (5th Cir. 1982). Moreover, the *Auriemma* litigation deals with alleged patronage demotions, a subject of manifest public concern and hence, of particular First Amendment importance. *See Connick v. Myers,* 461 U.S. 136, 149 (1983). Nor is there anything in this record to suggest that the interests of the Police Department, as employer, require restricting the scope of plaintiff's speech rights. There is nothing in the record to suggest that Sergeant Considine's participation in the *Auriemma* litigation interfered with his efficiency as a police officer, compromised his ability to perform his duties or disrupted the offices in which he worked. *See generally Connick, supra* at 150-52; *Wilson v. Taylor,* 658 F.2d 1021, 1027 (5th Cir. 1981). [7]

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7. In seeking to have Sergeant Considine transferred from the Crime Laboratory when he learned of the *Auriemma* litigation, Director Gall told Deputy Superintendent Rodriguez that because of the litigation, "Personal loyalties within the laboratory will be strained and effective management difficult". (Complaint, Ex. C.) While the court believes that Director Gall was legitimately and sincerely concerned about the tension the pendency of the litigation might create, it does not find this fear sufficient to remove the litigation from the protection of the First Amendment. There was no showing of actual

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## *Appendix C*

### A. *September 1984 Transfer from the Crime Laboratory to the Special Functions Group*

On December 2, 1983, plaintiff Considine was demoted from the position of Director of the Crime Laboratory, a position he had held for six years. Captain Paul Gall, an experienced police officer without Crime Laboratory experience or technical training, whose wife had been an active supporter of Mayor Washington in the mayoral election, was promoted to replace him. At the time of his demotion, Sergeant Considine was informed that he would remain assigned to the Crime Laboratory, as Director Gall's subordinate, and he resumed his career rank of sergeant. Shortly after his promotion, Director Gall spent four to six days away from the Crime Laboratory, and shortly thereafter, Sergeant Considine took a furlough, returning to work after the Christmas holidays in early 1984. On February 7, 1984, plaintiff filed suit in *Auriemma*. On February 10, 1984, within a day or two of learning of the lawsuit, Director Gall prepared a memorandum to his superior, Deputy Superintendent Rodriguez, complaining, *inter alia*, that Sergeant Considine "has filed suit to take away my job" and requesting "a conference with the Corperation [sic] Counsel to ascertain what action can be taken to remove Marshall

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disruption caused by the litigation and no showing that management was in fact made difficult because of it. Since employment litigation always generates some tension, it is this court's view that, in the absence of a showing of such a close working relationship between plaintiff and defendants that one can reasonably presume that personal loyalty and confidence are essential to proper functioning, some actual disruptive impact must be shown. *See McKinley v. City of Eloy*, 705 F.2d 1110, 1115 (9th Cir. 1983). It should be noted in this regard that defendants did not contend that the impact of the litigation on Crime Laboratory management justified the transfer of Sergeant Considine; they contended instead that the lawsuit was not a motivating factor in Director Gall's decision to seek Sergeant Considine's removal.

Considine from his position in the Crime Laboratory." Deputy Superintendent Rodriguez refused to accede to Director Gall's request, based on the unacceptable reasons for the request as set forth in the memorandum. However, on September 1, 1984, pursuant to another request from Director Gall, Sergeant Considine was transferred out of the Crime Laboratory. This transfer is challenged as retaliatory.

Weighing heavily in plaintiff's favor is the fact that as of February 10, given their respective absences during December, Direcor Gall and Sergeant Considine had been together in the Crime Laboratory for at most five weeks. During the December 2 to February 10 period, Director Gall had requested a promotion for Sergeant Considine, and Sergeant Considine had assisted Director Gall in formalizing his membership in the American Society of Crime Laboratory Directors, both indicia of reasonably cordial relations. The two had had little or no extended conversation, but they had had a cordial lunch together at Director Gall's invitation at a local restaurant. During this time period, there is no indication that Director Gall ever suggested to Sergeant Considine or to anyone else that Sergeant considine's performance was less than satisfactory, and during the entire period of time, Director Gall's request for a promotion for Sergeant Considine was pending.

On February 8, Director Gall learned of the *Auriemma* suit from a newspaper article. The evidence is clear that he reacted to the suit by becoming extremely angry, viewing its allegations, as he understood them, as insubordination, a personal attack on his competence, a charge against him of being a patronage employee and a threat to his job. Emotionally charged, he wrote his memorandum to Deputy Superintendent Rodriguez, seeking plaintiff's transfer. Despite defendants' efforts to prove the

contrary, the court finds this memorandum unambiguous: Considine had to be removed because he had challenged the legitimacy of Gall's authority. This memorandum was replete with derogatory, sarcastic attacks on plaintiff. Deputy Superintendent Rodriguez so perceived the memo and refused to act on it, telling Director Gall " that as a manager he has got to go back and reflect on things not out of anger but as a manager."

It is also clear that after the events of February 7-10, the working relationship between Director Gall and Sergeant Considine deteriorated beyond any hope of repair. Director Gall admitted that thereafter, he viewed it as a "lost cause" to ask Sergeant Considine questions or to give him assignments. Director Gall began criticizing Sergeant Considine to his superiors and two months later, withdrew his request that Sergeant Considine be promoted. Perhaps most important, Director Gall testified that for three or four months preceding his September request for Sergeant Considine's transfer, he excluded Sergeant Considine from supervisory meetings in the Crime Laboratory, meetings in which Sergeant Considine's rank clearly entitled him to participate. Despite the fact that the actual transfer did not take place until September, it is evident that for months before that, Sergeant Considine was, as he himself described it, a "non-person" in the Crime Laboratory.

While even a summary recital of the evidence makes clear that Sergeant Considine has a substantial case and may well prevail on the merits at trial, there are some countervailing factors. Deputy Superintendent Rodriguez testified that he was not surprised when he received Director Gall's February 10 memo because "he anticipated a problem down there in December of 1983." (Rodriguez, May 10, 113.) He explained that when newly appointed Director Gall indicated that he wanted to keep Sergeant Considine

in the Crime Laboratory, his reaction was negative:

> I indicated to him that I thought it was inadvisable. I thought it was inadvisable from, first of all, on a standpoint of possible friction. I thought it was inadvisable personally for Marshall Considine because we have a situation here where he was the director of the crime laboratory and, you know, almost overnight he would be assuming a position subordinate to the director of the crime laboratory.
>
> Director Gall indicated that he thought these things could be overcome. He indicated that he felt that Marshall Considine's presence would provide some type of constancy to his new administration, to his new administration at the crime laboratory.
>
> I felt that Marshall Considine's longstanding involvement as a supervisor in the crime laboratory, the rapport that he had developed among the people that were working there, was very important—it was very important to Marshall Considine's—his approach, his philosophy of running the crime lab, which I kind of identified as a facilitating type of approach. And I still felt that it was ill advised. And I was really concerned as to whether it was an appropriate decision.
>
> However, Paul Gall was new to me in December of 1983. There was this possibility that perhaps Marshall Considine could overcome what

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> I thought were some impediments. That possibly—again our goals are to get the things done and to accomplish the goals of the Department. And I let him go ahead with the request.

(Rodriguez, May 10, 121-22.)

Moreover, the testimony of plaintiff Considine and defendant Gall suggests to this court that even before February 7, 1984, they were not adjusting well to one another's "style." Sergeant Considine testified that on numerous occasions, beginning as early as their first lunch together, he asked Director Gall to clarify his duties. Director Gall, as far as this court can tell, never did so. At the outset Director Gall was overwhelmed by his new duties and insufficiently understood what had to be done to make reasonable and focused delegation decisions. (Gall, May 22, 72.) Moreover, his view of the functions Sergeant Considine might serve was both expansive and imprecise. He hoped Sergeant Considine would be "sort of a Director Emeritus," and he "wanted his input on mostly anything." (Gall, May 22, 76.) Meanwhile, Sergeant Considine, after numerous attempts to have Director Gall give him some directions, occupied himself primarily with work he himself found to do, work of which Director Gall was ignorant or which he viewed as inconsequential.

Having observed the demeanor of the two men as witnesses and their obvious difference in manner and management philsophy and style, the court does not believe that the conflicts that developed between them can be blamed entirely on Director Gall's reaction to the *Auriemma* lawsuit. The court's impression is that Director Gall, virtually overwhelmed by the demands of his new position, wanted Sergeant Considine to act as his general aide and assistant, but that, because Director Gall's inability to delegate

definitively and various differences in personality and working style between the two men, the two had not, by February, achieved a modus vivendi. It appears to this court that the lawsuit was simply an additional irritant—albeit a significant one—in an already diffficult situation. While the court finds that plaintiff presented adequate prima facie evidence that his transfer from the Crime Laboratory was in retaliation for his protected conduct, it also finds that the evidence went far toward satisfying the defendants' burden to show that the transfer would have occured regardless of the *Auriemma* suit. While the court believes there is a not insubstantial possibility that plaintiff will prevail on this issue at trial, the evidence is too close at this state to give rise to a firm finding of a likelihood of success.[8]

B. *The Detail to the Sixteenth District*

With respect to plaintiff's April 29 detail from his administrative post at police headquarters to a field assignment in the 16th Police District, the court finds that the evidence preponderates in plaintiff's favor and that, as the evidence stands now, plaintiff has shown a likelihood of success on the merits.

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8. Even if the court were to conclude that plaintiff satisfactorily demonstrated a likelihood of success on the merits, it would not be inclined to conclude that plaintiff should be reassigned to the Crime Laboratory pending trial on the merits. Director Gall and Sergeant Considine have never worked effectively together and are unlikely to be able to do so simply because the court orders defendants to reassign Sergeant Considine to the Crime Laboratory. In view of this court's conclusions concerning Sergeant Considine's subsequent reassignment to the field and the relief that it recommends respecting that reassignment, the court believes that the balance of relevant factors, including defendants' and the public interest, does not require that Sergeant Considine be placed in a position where he cannot be effectively utilized. Such relief may, of course, be appropriate after a full airing of this [copy illegible at this point].

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The court is influenced both by the manner in which the reassignment was brought about and by the inconsistent and generally unsatisfactory evidence presented concerning the way in which the decision to reassign plaintiff was made. In the court's view, this evidence strongly suggests that the ressignment was intended not only to be punitive but to look punitive and hence to demonstrate plaintiff's vulnerability to arbitrary and punitive treatment.

We begin with the uncontested evidence that this was plaintiff's second reassignment in a period of seven months and his third reassignment in slightly over a year, if his demotion is taken into account. Not only was the timing of the reassignment likely to be disruptive to plaintiff, who had previously served stably and with distinction in one career track for nearly 25 years, but the nature of the reassignments was such as could only have had a disruptive and humiliating impact on any officer's career. Plaintiff had not only been removed from his high-level supervisory position as Director, concerning which he may or may not have a cognizable complaint, but he had been uprooted from the Crime Laboratory, a specialized area in which he had spent virtually his entire professional life. Despite this major change, he performed extremely well in his Special Functions group assignment. With his reassignment to the 16th District, he was being moved again, out of administration into the field, another major change in his career. If this were not in itself disruptive enough, defendants chose to bring about the reassighment by means of a detail, declining to wait *two weeks* until the end of a police period so that plaintiff and his sending and receiving superiors could have ordinary and routine notice of the reassignment. The effect of the use of the detail mechanism here had the effect, as defendants knew or should have known it would, of "embarrassing" plaintiff in all senses of that word, that is,

to perplex, hinder, impede, impair, to involve in difficulties and to cause distress. Plaintiff's Special Functions group supervisor was not prepared to lose him; the Commander of the 16th District was not prepared to receive him. Since plaintiff was not consulted, warned or counselled, he neither understood what was happening nor why it was happening, nor could he explain to those who asked him (i.e., Captain Keating, Captain Jankowski) why he was being so precipitiously and unceremoniously moved.

Plaintiff did not have to be reassigned in this manner. It appears clear, not only from the direct testimony concerning how reassignments of supervisory personnel are normally brought about but also by the testimony of many officers who described their own career paths, that the reassignment of a sergeant, with no attempt to counsel or explain to him what is happening in advance, is unusual and contrary to most officers expectations of how the Police Department, when not acting punitively, accomplishes managerial changes. The manner in which plaintiff's reassignment was brought about had the effect of making him look vulnerable; the evidence established that defendants well knew that their action would so appear.

The only explanation given by defendants for use of the detail mechanism was First Deputy Jemillo's testimony that, once he realized that Sergeant Considine was in a "make-work" position, he felt that it would have been "wasteful" to let him remain in that position for the two weeks remaining in the police period. This explanation is not such as to inspire confidence in defendants' good faith, in view of the fact that the position had been held by a full-duty sergeant for at least three years and the further fact that there was no specific position Sergeant Considine was immediately needed to fill. Hence, there was no emergency. The only way waiting for the end of the police period could be counted

as "wasteful" would be if normal management practices, and the needs, expectations, reputation and standing of Sergeant Considine, were ignored. Defendants can be expected to have realized the kind of disruptive and embarrassing impact this manner of reassignment would have on plaintiff. Their decision to bring about the reassignment in the manner most likely to disrupt and embarrass plaintiff strongly suggests a punitive motivation.

There is a further reason why the use of the detail procedure was suspect in these circumstances. The evidence indicated that details are used to provide personnel to fill specific needs of the department, either on a temporary basis or because the department's budget makes a reassignment impossible. While there was some evidence that the detail mechanism has been used for the specific purpose of removing someone from a given assignment, the evidence indicated that this would likely occur only in a real emergency, where, for instance, the health of a member required his immediate reassignment. While the court understands that the detail mechanism exists to provide management with flexibility and that any listing of the situations in which details have been used in the past should not be treated as exhaustive, the evidence makes clear that the reorganization of a unit, such as the Special Functions group, so as to more efficiently deploy personnel, is not the kind of situation for which details are designed or for which they are typically used. This would appear to be a permanent rather than a temporary reassignment, brought about neither to fill a specific emergency need nor to relieve an emergency problem in the sending unit. The use of a detail here, considering the evidence on the usual purposes for which the detail procedure is used, is disturbing.

Moreover, there is no question but that defendants knew that

moving Sergeant Considine from an administrative post in headquarters to a field assignment would likely be viewed by him and by others as undesirable. One year earlier, First Deputy Jemilo testified, a sergeant similarly reassigned had resigned his position rather than go to the field.

Finally, the state of the evidence regarding how the decision was made to reassign plaintiff tends to support plaintiff's position that he was reassigned for punitive rather than neutral reasons.

First, the evidence was hopelessly inconsistent as to when First Deputy Jemilo realized that Sergeant Considine was in a "make-work" position. He testified that he had been familiar with the position for many years, but when asked why he had never sought to eliminate it while Sergeant Kehoe held it, he suggested that it was only in the week before April 29 that he actually realized how wasteful the position was. This testimony could be understood if there had been any evidence of an actual investigation or inquiry by First Deputy Jemilo in the period immediately preceding April 29. The evidence, however, proved the opposite. In the face of clear evidence that reassignments within the Patrol Division normally originate with Chief Keating or his subordinates and are approved by First Deputy Jemilo and Superintendent Rice, Sergeant Considine's reassignment was a top-down change, ordered by the First Deputy, requiring a reorganization of patrol Division administration, with *no* consultation with or input from the Chief of the Patrol Division or the personnel who supervised Sergeant Considine and knew what functions he was performing. Such an order, originating in the highest ranks of the Police Department, following upon no consultation with anyone in the Patrol Division, leaves the court at a loss to ascertain what input First Deputy Jemilo had in the week preceding April 29 that made him conclude that

Sergeant Considine had to be moved immediately. The preliminary evidence this court heard permits only one conclusion — that this was an ad hominem decision, motivated by a desire to move Sergeant Considine, not a neutral decision to reorganize the Special Functions group.

The court also finds troubling First Deputy Jemilo's reliance, in testifying, on job descriptions of the sergeants in the Special Functions group prepared by his subordinates to aid his testimony *after* he had ordered Sergeant Considine detailed to the field. The defendants' position was that the reassignment of Sergeant Considine was based on neutral criteria and would have taken place regardless of Sergeant Considine's participation in the *Auriemma* litigation. The defense position requires this court to find that First Deputy Jemilo had a good faith basis to believe that Sergeant Considine's position did not require a full-duty sergeant and that the two other Special Function group sergeants could do whatever work of Sergeant Considine's required the attention of a sergeant. If, as of April 29, two weeks before First Deputy Jemilo testified, he did not know with reasonable precision what the Special Functions group sergeants did, it is difficult to understand on what rationale he based his decision to move Sergeant Considine, particularly in light of the fact that he had no input from the Patrol Division. While the court does not find First Deputy Jemilo's reliance on these testimonial aids dispositive, it believes they are a circumstance worthy of consideration in evaluating the credibility of defendants' proffered justification for Sergeant Considine's precipitous reassignment.

It cannot be disputed that defendants are empowered to deploy personnel in any way they see fit, and that they had the power and the right to detail Sergeant Considine to the field. In addition, this reassignment was consistent with Superintendent

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Rice's general policy of attempting to strengthen the presence of the Patrol Division in the field. Nonetheless, it is well-established that "[a]n act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when take for a different reason, would have been proper." *Matzker v. Herr,* 748 F.2d 1142, 1150 (7th Cir. 1984). Plaintiff has adequately shown that he was singled out for an undesireable reassignment by individuals responsible for his demotion and aware of his lawsuit challenging it. He has also satisfactorily shown that the manner in which his reassignment was carried out deviated from ordinary practice in ways which appear to have been punitive, which appear to have been calculated to look punitive, and which had the clearly forseeable effect of humiliating plaintiff and disrupting his efforts to get his career back on track in the wake of his demotion. Defendants have failed in their attempt to show that plaintiff was reassigned for neutral reasons of that the manner of his reassignment comported with ordinary procedure. As one court has stated, "an inadequately explained adverse action is more likely than not based on impermissible factors." *Shaw v. Cassar,* 558 F.Supp. 303, 313 (E.D. Mich. 1983). Accordingly, the court concludes that plaintiff has carried his burden of showing a likelihood of success on the merits.

II. Irreparable Injury

Having determined that plaintiff has satisfied his threshold burden of demonstrating a likelihood of success on the merits, the court may now proceed to an evaluation of whether preliminary injunctive relief is justified by the harm plaintiff will suffer if he is not protected from further retaliatory acts *pendente lite.* Since the relief plaintiff requests, reinstatement to a position which defendants maintain does not require his services, is an

extraordinary remedy to impose prior to the full airing of these issues at a trial on the merits, plaintiff must make "a substantial showing of irreparable injury." *EEOC v. City of Janesville,* 630 F.2d 1254, 1259 (7th Cir. 1980). We think he has done so here.

The gravaman of plaintiff's complaint is that he is being compelled to pay an impermissible price for engaging in constitutionally-protected conduct. In such cases, it has been said that "irreparable injury is presumed." *Goodwin v. LaPolla,* 589 F.Supp. 1423, 1430 (N.D. N.Y. 1984). While it is true, as defendants point out, that plaintiff has not yet been silenced by defendants' allegedly retaliatory treatment of him, and that, to date, he has aggressively litigated every adverse employment action taken against him, we think that in the First Amendment area, it is sufficient for plaintiff to demonstrate that he is being subjected to treatment that would be likely to chill the exercise of constitutionally protected conduct in a person of reasonabel fortitude.[9] We believe plaintiff has adequately met this test, and we will not attempt to speculate on whether or not, if he were denied relief, he would continue aggressively to press his claims.

As the Seventh Circuit Court of Appeals stated in *McGill v. Board of Education,* 602 F.2d 774, 780 (7th Cir. 1979), "the threat of transfer" to a less desireable assignment or to one that involves added difficulties or risks, can be "an effective means

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9. Plaintiff credibly testified that because of his age and his long years of service with the Police Department, he realizes that his career is near its end and that, accordingly, he is less intimidated by the fear of retaliation than he would have been at an earlier stage in his career. He testified in addition that the fear of retaliation directed toward others more vulnerable than he is has inhibited him from associating with some old friends and colleagues in the Police Department. (Considine, May 22, 44, 179-80.)

of chilling constitutionally protected speech." Plaintiff has clearly demonstrated that his frequent reassignments, to less desireable positions, involving duties unrelated to his training or experience, with no counselling or even reasonable notice, have created a highly stressful situation, have caused a significant impediment to plaintiff's ability to perform his duties with the efficiency and effectiveness his record indicates he typically demands on himself, have embarrassed him in the eyes of his colleagues and have disrupted his career in a significant way. These factors, coupled with the clear and present threat to the exercise of his First Amendment rights discussed above, constitute a sufficient showing of irreparable injury for which there is no adequate remedy at law.

III. The Balancing of Harms and the Public Interest

Two additional issues must be addressed. First, to be entitled to a preliminary injunction, plaintiff must show that the threatened injury to him outweighs the harm that defendants may suffer in the motion for a preliminary injunction is granted. Second, he must show that the issuance of a preliminary injunction will not disserve he public interest. In a case in which the plaintiff asserts that the injury threatened to him is a chilling effect on his First Amendment rights, and in which the requested injunction would affect no private interests but rather would have its impact on the conduct of a municipal police department, these issues are inextricably intertwined. Accordingly, they will be discussed together.

The threatened harm to plaintiff, as discussed more fully above, is that he will be deterred from the exercise of his constitutionally protected right to litigate his claims or that he will be compelled to pay an impermissible and injurious price for doing so. The threatened harm to the defendants if a

preliminary injunction is issued is that they will be prevented from deploying plaintiff as the free exercise of their discretion would dictage, with a possible attendant injurious effect on the efficiency and effectiveness of police services.

Clearly, there is a significant public interest, coterminous with defendants' interest here, in permitting local government to carry on its own affairs by and through its elected officials and those they appoint to carry out their policies, an interest that is seriously threatened by an injunction of the sort plaintiff requests. Accordingly, in deciding whether to issue a preliminary injunction, the court must give substantial weight to the interests of local government in governing. *See Wells v. Hutchinson,* 499 F.Supp. 174, 206 (E.D. Tex. 1980). This interest is entitled to even more weight when the agency of local government upon which the injunction will have its primary impact is the police department, since the safety and welfare of the community as a whole may be directly affected. The testimony at the hearing in this case made clear that sergeants are a commodity in short supply in the Chicago Police Depatment. The court should hesitate long and hard before entering an order that would limit or impede the Deparment's ability to deploy a sergeant in a manner which the Department's supervisory pesonnel view as most likely to promote the safety and well-being of the community. *See generally Wilson v. Taylor,* 658 F.2d 1021, 1027 (5th Cir. 1981). As indicated above, the court is cognizant of the fact that Superintendent Rice is committed to the depolyment of additional officers, including supervisory officers, to the field, and Sergeant Considine asks this court to prevent his deployment in that manner.

Were this simply a case of plaintiff's First Amendment rights set against the interest of the public in the most efficient conduct of the police depatment, the court might decline to grant a

preliminary injunction since, however the parties' relative harms are balanced, and adverse impact on the public interest would result, and the public interest, according to the standards for a preliminary injunction set out above, is not subject to balancing. The public interest as revealed by the evidence in this case, however, is more complex and more multifaceted than that. It is, for instance, not clear that the manner in which Sergeant Considine has been treated is consistent with the public interest in efficient police management. Indeed, the testimony of many credible witnesses established that the manner in which Sergeant Considine was treated was not consistent with good police management practices.

Further, and more importantly, there are significant public interests at stake here that weigh heavily *in favor of* the preliminary injunction plaintiff seeks. The public interest in the full and fair litigation of the issues raised by the *Auriemma* litigation is substantial. Numerous cases have recognized that patronage demotions as are alleged in the *Auriemma* complaint may have a significant deleterious impact on the functioning of public agencies. *See generally Elrod v. Burns,* 427 U.S. 347, 364-67 (1976). And whether that is as a practical matter true or not, the public interest in the airing of such issues is significant. As the Supreme Court stated in *Connick v. Myers,* 461 U.S. 138, 149 (1983), "[W]e believe it [is] apparent that the issue of whether [public empolyees] are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal."

It is, of course, not only Sergeant Considine's rights that are at stake here. There is nothing that emerged more clearly from this hearing than the fact that to many in the police department, including high-ranking officers not demoted by Superintendent

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Rice and not parties to the *Auriemma* litigation, what has happened to Sergeant Considine looks like a show of punitive political muscle. The gallows humor of co-workers[10] may not prove that plaintiff's reassignments were retaliatory, but they certainly indicate that they *looked* retaliatory. In view of such evidence, we must be heedful of the impact the treatment of Sergeant Considine might have on the willingness of others in the Police Department to exercise their First Amendment rights. In such a situation, we think that the public interest itself requires that the court act to vindicate the First Amendment rights at stake. *See Kuhlmann v. Bloomfield Township,* 521 F.Supp. 1242, 1245 (E.D. Wis. 1981)

CONCLUSION

Accordingly, it is the recommendation of this court that plaintiff's motion for a preliminary injunction be granted, that defendants be enjoined from detailing plaintff to the 16th Police District and that plaintiff be restored to his position in the Special Function group or to a comparable administrative position. The court further recommends that within 14 days of the date hereof, unless the district court extends the time, the parties submit a draft order that would prohibit the reassignment of Sergeant Considine pending trial on the merits absent reasonable advance notice and a showing by defendants, if plaintiff so requests, that the reassignment is not based on retaliatory motives.

Counsel are given ten days from the date hereof to file exceptions to this Report and Recommendation with the Honorable James F. Holderman.

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10. See testimony of James Doran, May 15, at 7-8; William Sherlock, May 15, at 11-13.

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Dated: September 20, 1985

Respectfully submitted,

JOAN B. GOTTSCHALL
United States Magistrate

## APPENDIX D — RULING OF JUDGE HOLDERMAN ON DEFENDANTS' FIRST MOTION FOR SUMMARY JUDGMENT: ORDER DATED FEBRUARY 26, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 84 C 1224

JOHN AURIEMMA, DANIEL COLL, MARSHALL CONSIDINE, RENALDO COZZI, KENNETH CURIN, RUSSELL DITUSA, THOMAS FARAGOI, LAWRENCE FORBERG, JOHN HINCHY, KATHRYN KAJARI, GEORGE MARCIN, PATRICK MCDONOUGH, WALTER MURPHY, JOHN RAFTER, DOMINIC RIZZI, JAMES STAMPNICK, THOMAS WALTON and ROGER WHALEN,

Plaintiffs,

v.

CITY OF CHICAGO, HAROLD WASHINGTON, CHICAGO POLICE DEPARTMENT, and FRED RICE,

Defendants.

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

Plaintiffs brought this action against Chicago Superintendent of Police Fred Rice, Mayor Washington, the Chicago Police Department ("CPD") and the City of Chicago. Plaintiffs challenge their demotions, in December 1983, from high-ranking positions

in the CPD. Plaintiffs amended their complaint in 1985 to also challenge defendants' allegedly retaliatory acts.

In Count One of plaintiffs' second amended complaint, plaintiffs allege that defendants violated Due Process and Section 1983 by demoting plaintiffs without cause and without hearings. In Count Two, plaintiffs allege that defendants violated the First Amendment and Section 1983 by demoting plaintiffs as punishment for their failure to support Mayor Washington in his mayoral campaign. In Count Three plaintiffs allege that defendants violated the Equal Protection Clause and Sections 1981 and 1983 by demoting plaintiffs for racial reasons. In Count Four plaintiffs allege that defendants violated Section 1985(3) by conspiring to violate plaintiffs' civil rights. In Count Five plaintiffs allege that defendants violated the First Amendment, the Fourteenth Amendment and Section 1983 by retaliating against plaintiffs for their initiation of this lawsuit.

Plaintiffs seek (1) a declaratory judgment; (2) a permanent injunction ordering defendants to reinstate plaintiffs and to stop any illegal practices; (3) compensatory and punitive damages; and (4) attorneys fees and costs.

In October, 1984 Judge Aspen denied defendants' motion to dismiss. Before the court is defendants' motion for summary judgment.

## FACTS

Plaintiffs dispute many of the facts underlying this lawsuit. They agree, however, on the following facts.

Plaintiffs held positions in the senior executive service ranks

of the CPD. By city ordinance, members of the senior executive service (the "exempt ranks") are exempt from the career service and from its protections against discharge. *See* Municipal Code of Chicago, ch. 25, ¶ 25.1-3(7)-(13) (1986). No city ordinance or personnel rule protects members of the senior executive service from discipline/discharge without "cause."

In 1983 Mayor Washington appointed Fred Rice as Superintendent of Police. Shortly thereafter, Rice demoted each of the plaintiffs from their positions in the exempt ranks. Rice did not provide plaintiffs with discharge hearings. Nor did Rice claim that plaintiffs' work performance had been deficient.

In February, 1984 plaintiffs filed this lawsuit. Plaintiffs claim that, since that time, Superintendent Rice, Mayor Washington, the City of Chicago and the CPD have subjected plaintiffs to a pattern of harassment and retaliatory treatment.

## DISCUSSION

Summary judgment is appropriate only if the parties' evidentiary materials show that there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c). To avoid summary judgment, the non-movant plaintiff must make a showing sufficient to establish the existence of each element essential to his case on which he bears the burden of proof. *Celotex Corp. v. Catrett,* 106 S.Ct. 2548, 2553 (1986).

### I. *Plaintiffs Forberg and Murphy*

Forberg and Murphy have not presented any evidence in response to defendants' motion for summary judgment. Plaintiffs cannot rely on the allegations in their pleadings. *Posey v. Skyline*

Corp., 702 F.2d 102, 105 (7th Cir.) *cert. denied,* 464 U.S. 960 (1983). This court, therefore, grants summary judgment in defendants' favor against Forberg and Murphy in the case.

II. *Due Process Claims*

The City argues that plaintiffs have not shown a property interest in their jobs because no state statute or city ordinance provides that members of the exempt ranks may be dismissed only for cause. While career service employees can be discharged only for cause, plaintiffs' positions are exempted from the career service. Mun. Code of Chicago, ch. 25, ¶ 25.1-5(12), 25.1-6. No ordinance or statute restricts the Superintendent's discretion to discharge non-career service ("exempt") employees.

A public employee can also acquire a property interest in continued employment from state statutes or from "mutually explicit understandings" between his employer and himself. *Perry v. Sindermann,* 408 U.S. 593 (1972). In the present case, plaintiffs argue that the City customarily demoted members of the senior executive service only for cause. Such a custom, if it existed, would not be inconsistent with city ordinances. *Cf. Shlay v. James Montgomery, et al.,* 802 F.2d 918 (7th Cir. 1986).

Plaintiffs have raised a genuine issue as to whether the City customarily demoted senior executive employees only for cause. Several plaintiffs described incidents in which predecessors of Superintendent Rice demoted particular exempt officers after "counselling" them as to their work deficiencies. While this evidence does not show a custom of requiring cause—if it did, a city could not discharge obviously poor employees without bestowing a property interest on all other employees—this evidence does not stand alone. Former Superintendent of Police Brzecek

testified that, when he was Superintendent, he demoted exempt officers only after evaluating their job performance. In addition, many of the plaintiffs testified that the exempt officers understood that they could not be demoted without cause. In sum, plaintiffs' evidence is sufficient to raise a genuine issue as to whether the City customarily demoted exempt officers only for cause.

III. *First Amendment Claim*

Plaintiffs' First Amendment claims survive defendants' motion for summary judgment. Plaintiffs have presented evidence from which a jury could infer that (1) political considerations were a substantial factor in defendants' decision to demote plaintiffs and that (2) plaintiffs do not occupy policymaking positions. *See Perry v. Larson*, 794 F.2d 279 (7th Cir. 1986). For example, plaintiff Kathryn Kajari testified that defendant Rice, when notifying her of her demotion, stated that "it's nothing you have done. The woman that's going to replace you has some really heavy ties over to City Hall."

The other plaintiffs' evidence of political motivation is considerably weaker than that presented by Ms. Kajari. Nonetheless, this court is reluctant to decide a disputed issue of motivation on a motion for summary judgment. *See Knapp v. Whitaker*, 757 F.2d 827 (7th Cir. 1985).

The parties also dispute the question whether plaintiffs occupied "confidential" or "policymaking" positions. Because this question is both material and factual, *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1984), it also precludes summary judgment.

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IV. *Race Discrimination Claims*

Plaintiffs' race discrimination claims survive defendants' motion for summary judgment. Plaintiffs have presented evidence from which a jury could infer that defendants intentionally discriminated against plaintiffs on the basis of race.

According to plaintiffs, on December 3, 1983 defendant Rice demoted 26 white officers, one Hispanic and no black officers from the exempt ranks. Michael Holewinski, administrative assistant to the Mayor, testified that he discussed the racial makeup of the exempt ranks with the Mayor just prior to Rice's making the demotions. Plaintiff McDonough testified that at his demotion interview, Rice stated that McDonough had done a "good job" but that "it's the numbers game." Finally, plaintiffs submitted a chart which Rice allegedly used in making his decision to demote plaintiffs. The chart contains the notation "white" beside the names of certain police officers. Cumulatively, the above evidence suffices to support an inference that defendants demoted plaintiffs because of their race.

V. *Conspiracy Claims*

Plaintiffs' Section 1985(3) claims also survive defendants' motion for summary judgment. Plaintiffs have raised a genuine issue as to each element of a Section 1985(3) claim: (1) a conspiracy; (2) a purpose to deprive plaintiffs of the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) injury. *See, Quinones v. Szorc,* 771 F.2d 289 (7th Cir. 1985).

According to plaintiffs' deposition testimony, in November of 1983, Ed Bishop, Superintendent Rice's executive assistant,

requested research from the Legal Affairs Office of the CPD as to the effect of *Shakman v. Democratic Organization of Cook County,* 569 F.Supp. 177 (N.D. Ill. 1983) on the Superintendent's discretion to hire and fire police officers. Bishop told a Legal Affairs officer, Russell Luchtenberg, that Superintendent Rice could replace police officers for any reason. Luchtenberg testified that Bishop discussed racial and political hiring and firing with him and asserted that Superintendent Rice could replace white officers with less competent blacks. According to Luchtenberg, after Luchtenberg gave his *Shakman* memo to Bishop, Bishop stated that "it was too late, the Superintendent had already talked to the hall, he was going to do what he was going to do and they would justify his actions at a later time."

Plaintiffs also presented evidence that (1) Micheal Holewinski, the Mayor's administrative assistant, met with Superintendent Rice prior to the December 1983 demotions and (2) they discussed the racial composition of the exempt ranks. Many of the plaintiffs' replacements supported Mayor Washington in his mayoral campaign. Finally, plaintiff Kajari testified that in her demotion interview Superintendent Rice told her that she had performed well, but that her replacement had "really heavy ties over to City Hall." Cumulatively, this evidence raises a genuine issue as to whether Superintendent Rice conspired with the other defendants to deprive plaintiffs of the equal protection of the laws.

VI. *Retaliation Claims*

To survive defendants' motion for summary judgment, plaintiffs must present evidence that plaintiffs' involvement in the *Auriemma* litigation motivated defendants to take adverse action against plaintiffs. While some plaintiffs have presented sufficient evidence on their retaliation claims to survive summary

judgment, most have not.

The following plaintiffs have not presented any evidence, specifically pertaining to them,[1] of retaliation: John Hinchy, George Marcin, Patrick McDonough, Dominic Rizzi, Renaldo Cozzi, Russell Ditusa and Kathryn Kajari. While Curin, Rafter and Hinchy claimed in affidavits that defendants had investigated and harassed "all plaintiffs," these general allegations would not alone support a jury verdict in favor of the above plaintiffs. And Hinchy, Marcin, McDonough, Rizzi, Cozzi, Ditusa and Kajari did not present additional evidence of retaliation. In resisting summary judgment, plaintiffs cannot merely rest on allegations in their complaint. *Posey v. Skyline Corp.*, 702 F.2d 102, 105 (7th Cir.) *cert. denied*, 464 U.S. 960 (1983).

Plaintiff Faragoi did not present sufficient evidence that defendants retaliated against him. Faragoi submitted only a transcript of a March, 1986 state court proceeding in which Faragoi was acquitted of battery. This evidence does not establish that defendants initiated the criminal proceeding against Faragoi in order to harass him; the complaining witness in the proceeding (a non-police officer) obviously believed that Faragoi had used excessive force in the underlying incident. Faragoi has not presented any evidence that the CPD proceeded with a baseless investigation of Faragoi in order to punish him for his involvement in *Auriemma*.

The retaliation claims of John Auriemma, Daniel Coll and Kenneth Curin cannot survive summary judgment. Auriemma, Coll and Curin alleged in their complaints that they were forced

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1. Several plaintiffs—Auriemma and Hinchy—conceded in their depositions

that they had not suffered any retaliation.

to retire in order to avoid retaliatory treatment.[2] Auriemma testified that when Superintendent Rice notified him of his demotion in December of 1983, Auriemma announced that he was going to quit the police force. Plaintiffs filed this suit on February 2, 1984. Auriemma could not therefore have resigned in order to avoid retaliation related to the *Auriemma* litigation.

Plaintiff Coll did not present evidence either that he retired in order to avoid retaliation or that he ever suffered retaliation. He has not raised a genuine issue as to whether defendants retaliated against him for participating in this lawsuit. *See Posey v. Skyline Corp.*, 702 F.2d 102, 105 (7th Cir.) *cert. denied*, 464 U.S. 960 (1983).

Plaintiff Curin submitted only one piece of evidence supporting his retaliation claim: an affidavit saying that, due to his fear of retaliation, he was considering retirement. Curin did not testify in his deposition to acts of retaliation. The bare allegation in Curin's affidavit is not sufficient to support an inference that he suffered retaliation or that he reasonably feared such retaliation.

Plaintiffs Rafter, Whalen, Considine, Walton and Calzaretta have presented sufficient evidence of retaliation to survive summary judgment. Rafter testified in his deposition that, since plaintiffs filed *Auriemma*, Superintendent Rice has not considered him for promotions and the Internal Affairs Division of the CPD has unfairly investigated him.

Whalen presented evidence that, since *Auriemma* began,

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2. Russell Ditusa and John Hinchy also alleged that they were forced to

retire in order to avoid retaliatory treatment. The court has already considered Ditusa's and Hinchy's retaliation claims, *supra.* defendants have unfairly denied him transfers and have unfairly investigated him. Considine presented evidence that the *Auriemma* litigation triggered the defendants' decision, in February 1984, to seek Considine's removal from the Crime Lab. Calzaretta testified that after he joined the *Auriemma* litigation in May, 1985, defendants denied his transfer requests. Walton testified that, after the *Auriemma* litigation began, two or three command officers asked Superintendent Rice to transfer Walton to their districts and Rice refused. While evidence that Rice twice bestowed commendations on Walton after *Auriemma* was filed undermines Walton's claim that Rice acted in retaliation when he denied Walton's transfers, this court will not decide this disputed issue of motivation on summary judgment.

Whether plaintiffs Rafter, Whalen, Considine, Walton and Calzaretta can establish that defendants retaliated against them for their involvement in this suit depends on the credibility of the various witnesses to and participants in the events underlying this lawsuit. This court finds only that the above-mentioned plaintiffs have raised a genuine issue of material fact as to their retaliation claims.

## CONCLUSION

Defendants' motion for summary judgment is GRANTED as to all claims of plaintiffs Forberg and Murphy. Defendants' motion for summary judgment is GRANTED on Count V as to plaintiffs John Hinchy, George Marcin, Patrick McDonough, Dominic Rizzi, Renaldo Cozzi, Russell Ditusa, Kathryn Kajari, Thomas Faragoi, John Auriemma, Daniel Coll and Kenneth Curin. Defendants' motion for summary judgment is DENIED

as to all other plaintiffs and all other claims.

The parties are strongly encouraged to discuss settlement and report on the status thereof on March 13, 1987 at 11:00 a.m.

ENTER:

s/ James F. Holderman
JAMES F. HOLDERMAN
United States District Judge

DATED: February 26, 1987